APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 08-56320

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

Jan. 12, 2010.

[2]Before HALL, THOMPSON and SILVERMAN, Circuit Judges.

MEMORANDUM*

*1 The plaintiffs are the Association of Christian Schools International ("ACSI"), Calvary Chapel Christian School ("Calvary"), and five Calvary students (collectively, "the plaintiffs"). They allege that the University of California ("UC") admission policy, which involves UC's review and approval of high school courses in order to qualify applicants for UC admission, is unconstitutional under the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses. The defendants, Roman Stearns, Susan Wilbur, Robert Dynes, Mark Rashid, and Judy Sakaki (collectively, "the defendants"), are the UC employees responsible for [3]developing and implementing the course approval policy. The district court determined that UC's policy was

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

constitutional on its face and as-applied and granted summary judgment in favor of the defendants on all claims. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. The Level of Judicial Scrutiny

The Supreme Court has rejected heightened scrutiny where, as here, the government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech. *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 203-208 (2003) ("ALA"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580-87 (1998); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998). As a university, one of UC's "essential freedoms" is to "determine for itself on academic grounds ... who may be admitted to study." *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). UC exercises that freedom by reviewing high school courses to ensure that they adequately prepare incoming students for the rigors of academic study at UC.

The plaintiffs' reliance on forum cases which apply heightened scrutiny is misplaced. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Regents of Univ. of* [4]*Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The plaintiffs concede that this case does not involve a forum. Nor does this case present a "close analogy" to forum cases as in *Southworth*. Here, UC evaluates high school courses to ensure they are college

preparatory, not to facilitate "the free and open exchange of ideas by, and among, its students." *Southworth*, 529 U.S. at 229-30. The forum cases are simply inapposite. *See ALA*, 539 U.S. at 206-07 (distinguishing *Rosenberger* because a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves."); *Finley*, 524 U.S. at 586 ("The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* ....").

II. The Plaintiffs' Facial Challenge

The plaintiffs have not alleged facts showing any risk that UC's policy will lead to the suppression of speech. *Finley*, 524 U.S. at 580 (To prevail on a facial challenge, a plaintiff "must demonstrate a substantial risk that application of the provision will lead to the suppression of speech"). Nor can they. It is undisputed that UC's policy does not prohibit or otherwise prevent high schools, including Calvary, from teaching whatever and however they choose or students from taking any course they wish. High schools can, and do, continue to teach courses even [5]when they are denied UC approval. UC does not punish a school for teaching, or a student for taking, an unapproved course. *Cf. R.A. V. v. City of St. Paul*, 505 U.S. 377, 391, 393 (1992) (invalidating an ordinance that set forth a clear penalty, proscribed views on particular disfavored subjects and suppressed distinctive ideas conveyed by a distinctive message).

*2 The plaintiffs devote much of their appeal to arguing that UC's policy on religion and ethics courses constitutes viewpoint discrimination. This policy provides that in order to receive UC approval, religion and ethics courses should "treat the study of religion or ethics from the standpoint of scholarly inquiry, rather than in a manner limited to one denomination or viewpoint." Aside from pointing out that UC's policy includes the word "viewpoint," the plaintiffs fail to allege facts showing that this policy is discriminatory in any way. It is not. As UC's expert explained, UC's policy is necessary because the "academic study of religion is multidisciplinary in nature" and "[p]rivileging one tradition or point of view is considered unacceptable and counter-productive in the scholarly study of religion at UC and similar colleges and universities."

Going beyond UC's written policies, the plaintiffs contend that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint. *See, e.g., Santa Monica Food Not Bombs v. City of* [6]*Santa Monica*, 450 F.3d 1022, 1035 (9th Cir.2006) (in a facial challenge, the court commonly considers the government's "authoritative interpretation of its guidelines" if it is a "well-established practice"). The evidence, however, is to the contrary. It is undisputed that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks as the primary and secondary course texts.

III. The Plaintiffs' As-Applied Challenge

As an initial matter, the district court correctly concluded that ACSI lacks associational standing to assert as-applied claims on behalf of its member schools that are not parties to this lawsuit.[1] ACSI cannot satisfy the third prong of the Supreme Court's associational standing test, which mandates that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require "individualized proof" specific to [7]each rejected course and the school that offered it. *Hunt*, 432 U.S. at 343; *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).[2]

Because ACSI lacks associational standing to bring as-applied claims on behalf of non-party member schools, the plaintiffs' as-applied challenge is limited to the four Calvary courses that were denied UC approval. The district court correctly determined that UC's rejections of the Calvary courses were reasonable and did not constitute

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[1] The plaintiffs do not contend that ASCI has associational standing to assert claims on behalf of non-ASCI member schools which had courses rejected by UC, including the Catholic and Jewish school courses the plaintiffs and amici repeatedly discuss in their briefs.

[2] Because we conclude that ACSI lacks associational standing, we need not address the district court's additional decision that the plaintiffs waived as-applied challenges for non-Calvary courses that were not timely disclosed. The plaintiffs lack standing to assert as-applied claims based on non-Calvary courses regardless of whether they were timely disclosed.

viewpoint discrimination. The plaintiffs offer no facts or evidence to disturb this conclusion. UC's rejection letters and internal meeting notes demonstrate that UC denied approval not because the courses added a religious viewpoint, but because they were either not college preparatory, lacked necessary course information or materials, or had other procedural defects which Calvary never bothered to cure.

*3 Alternatively, the plaintiffs contend that issues of fact exist with respect to their as-applied challenge which preclude summary judgment. The plaintiffs, however, have forfeited this argument. Instead of identifying the factual issues and asserting arguments as to why they were material, the plaintiffs merely provide a [8]table of citations to various declarations, affidavits, exhibits and depositions relating to each rejected course, leaving this court to "piece together" their argument. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.2003) (holding that the plaintiff forfeited its preemption claims on appeal where it provided a "five page laundry list of the challenged regulations and their titles, leaving the court to piece together the argument for preemption as to each regulation"). The district court properly rejected the plaintiffs' as-applied challenge.

IV. The Plaintiffs' Additional Arguments

The plaintiffs assert a myriad of legal arguments attacking the district court's decision, all of which lack merit. We address each in turn.

A. Animus

The plaintiffs contend that the district court erred by requiring them to show evidence of animus in order to succeed on their claims under the Free Speech and Establishment Clauses. The district court, however, did not require animus under the Establishment Clause. Nor did it require animus under the Free Speech Clause as the plaintiffs contend; instead, it held that a showing of animus could render an otherwise reasonable policy unconstitutional. *See Finley*, 524 U.S. at 587.

[9]B. The "Unbridled Discretion" Doctrine

Next, the plaintiffs argue that the district court erred by limiting the unbridled discretion doctrine to licensing and prior restraint cases. We need not, however, resolve the scope of this doctrine. *See Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (noting that the scope of the doctrine is "far from clear"). We affirm the district court's decision based on its alternative holding that, assuming the doctrine applies, UC provides sufficient guidance for course review to defeat a challenge of unbridled discretion.

C. The "Primary Effect" Prong of the *Lemon* Test

The plaintiffs mistakenly argue that the district court erred by inventing a "primary effect" standard under the Establishment Clause. The district court did not invent the "primary effect" language. The Supreme Court used that language in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As we have explained, the "second prong of *Lemon* bars

governmental action that has the 'principal or primary effect' of advancing or disapproving of religion." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1256 (9th Cir.2007) (quoting Lemon, 403 U.S. at 612).

D. The "Hybrid-Rights" Doctrine

[10]The plaintiffs contend that the district court erred by not applying strict scrutiny to their free exercise claim under the so-called hybrid-rights doctrine. Yet the plaintiffs offer no reason to depart from our recent decision in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir.2008) where we "declin[ed] to be the first" court to allow a "plaintiff to bootstrap a free exercise claim" using the hybrid-rights doctrine. *Id.*

*4 The plaintiffs' contention that the district court misread *Sherbert v. Verner*, 374 U.S. 398 (1963) in its discussion of the Free Exercise Clause is irrelevant. The plaintiffs do not and cannot challenge the crux of the district court's rejection of their free exercise claim-that UC's policies were more akin to the civil regulation that was upheld in *Locke v. Davey*, 540 U.S. 712 (2004) than the criminal prohibition that was invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

E. The Equal Protection Clause

The district court properly applied rational basis scrutiny to the plaintiffs' equal protection claim. *See Locke*, 540 U.S. at 721 n. 3 ("Because we hold ... that

the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims.") (citations omitted). The plaintiffs nevertheless argue that strict scrutiny applies because religion is a suspect [11]class. Courts, however, only apply strict scrutiny when distinctions are made on the basis of a suspect class, like religion. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir.2001).

The record is devoid of any evidence showing that UC discriminates on the basis of religion. UC's course approval policy is the same for all in-state applicants, regardless of religion. The plaintiffs do not contend that any student has been denied UC admission based on the student's religion. Nor do they contend that any student has been denied eligibility based on UC's rejection of a high school course. UC's policy and its individual course decisions are not based on religion, but on whether a high school course is college preparatory. As the defendants point out, whether a course is college preparatory is not a suspect classification; therefore, the Equal Protection Clause requires only that UC's distinctions be rational.

F. The 150 Rejected Courses and the "Overbreadth" Doctrine

The plaintiffs argue that the district court erred by "entirely ignoring" evidence that UC rejected over 150 courses from religious high schools (the majority of which are not plaintiffs in this case) and by refusing to apply the overbreadth doctrine. To the

contrary, the district court expressly recognized the [12]laundry list of 150 rejected courses proffered by the plaintiffs and concluded it was irrelevant because the plaintiffs did "not provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved."

That the district court did not specifically address the rejected courses in its analysis of the overbreadth doctrine does not constitute error. The plaintiffs' list of 150 rejected courses, without any supporting analysis, does not raise a genuine issue of material fact with respect to whether UC's policy "punishes a 'substantial' amount of protected free speech" in violation of the overbreadth doctrine. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The plaintiffs failed to provide any evidence of punishment, or even a chilling effect, because high schools are free to continue teaching the courses even if UC denies approval.

G. The Plaintiffs' Additional Expert Affidavits

*5 The plaintiffs contend, without support, that the district court erred in excluding "certain opinions" in its additional expert affidavits. The plaintiffs do not specify which opinions in the affidavits were improperly excluded, nor do they explain why the exclusions were erroneous, and have therefore failed to preserve this argument. *See Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.... We will not manufacture arguments for an appellant, [13]and a bare assertion does not

preserve a claim, particularly when, as here, a host of other issues are presented for review.").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (MANx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

Aug. 8, 2008

ORDER GRANTING DEFENDANTS' "MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' AS-APPLIED CLAIMS" [Docket No. 172]

S. JAMES OTERO, District Judge.

This matter is before the Court on Defendants' "Motion for Summary Judgment on Plaintiffs' As-Applied Claims," filed May 28, 2008, --- F.Supp.2d ---- -. Plaintiffs filed an Opposition, to which Defendants replied. The Court heard oral argument from the parties on July 18, 2008. (Docket No. 221.) Because Plaintiffs fail to raise a genuine issue of material fact in support of their "as-applied" claims, Defendants' Motion is GRANTED.

I. *BACKGROUND*

Plaintiffs-Calvary Chapel Christian School ("Calvary"), five Calvary students, and the Association of Christian Schools International ("ACSI")-brought suit against Defendants-several University of California ("UC") employees-for

developing and implementing an admissions process that allegedly violates the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.

[2]UC admits most California applicants based on achievement in high school courses and standardized tests. However, UC only considers courses that it has approved to ensure that admitted students took courses that provided those students with the knowledge and skills to succeed in their studies at UC.[1]

The focus of Plaintiffs' suit is the method by which UC approves high school *983 courses. Plaintiffs allege that this method is unconstitutional on its face and as applied to specific courses.

Earlier this year, the Court ruled on one round of summary judgment motions brought by the parties. In those motions, Defendants requested summary judgment only on Plaintiffs' facial claims, while Plaintiffs requested summary judgment on all of their claims-both facial and as-applied. After determining that Defendants' policies and actions are subject to rational basis review, the Court granted summary judgment in favor of Defendants on Plaintiffs' facial claims. Plaintiffs' request for summary judgment was denied in its entirety, leaving Plaintiffs' as-applied claims remaining for adjudication. Upon the parties' request, the Court

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[1] This Court's "Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Partial Summary Judgment" (the "Prior Order") describes the UC admissions process in greater detail. (Prior Order 1-4.)

granted Defendants leave to file a second summary judgment motion concerning Plaintiffs' as-applied claims.

Now, Defendants move for summary judgment on Plaintiffs' as-applied claims.

II. *DISCUSSION*

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material act and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A "material" fact is one that could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3]Plaintiffs identify 38 courses [2] proposed by religious schools and rejected by UC that Plaintiffs believe were unconstitutionally denied approval. Defendants argue that they are entitled to summary judgment for numerous procedural and substantive reasons.

A. *Defendants' Procedural Arguments*

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[2] Plaintiffs originally filed a list of 41 challenged course decisions (Docket No. 167), but withdrew three of those challenges (Docket No. 192).

Defendants offer several reasons why they are entitled to summary judgment as to most of the course rejections without addressing the merits of Plaintiffs' as-applied claims: (1) Plaintiffs do not have standing to challenge UC's decision to reject courses offered by schools other than Calvary; (2) Plaintiffs failed to raise most of their as-applied claims in a timely manner; and (3) Plaintiffs failed to timely disclose expert conclusions regarding individual course decisions.[3]

1. *Standing for Non-Calvary Course Decisions*

Defendants contend that Plaintiffs do not have standing to pursue their claims regarding UC's rejection of courses taught at schools other than Calvary. (MSJ 8.) ACSI, an organization of Christian schools, claims that it has associational standing to pursue as-applied claims on behalf of its member schools that had courses rejected.

Associational standing permits an organization to litigate as a representative of its members if: "(a) [the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane***984** to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the

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[3] Defendants also argue: (1) Plaintiffs do not have standing for prospective injunctive relief; (2) Plaintiffs' challenges regarding seven of the course decisions are barred by the statute of limitations; and (3) Plaintiffs' expert opinions are given by individuals addressing subject matter outside their field of expertise. The Court does not address these issues.

participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Defendants concede that ACSI satisfies prongs (a) and (b) of the *Hunt* test, arguing only that ACSI does not satisfy prong (c) because the claims asserted and the relief requested require the participation of individual members. Plaintiffs counter that its claims and relief do not require the participation of individual members and, even if they did, Defendants waived their objection.

[4]a. *Defendants Did Not Waive Their Standing Objection.*

Generally, standing cannot be waived if based on constitutional requirements imposed by Article III. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). Constitutional standing requires at a minimum: "(1) an injury in fact[;] (2) a causal relationship between the injury and the challenged conduct[;] and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.*

However, federal courts also impose judicially created "prudential" standing requirements that further limit their jurisdiction. *Id.* Prudential elements of standing, unlike the constitutional requirements, can be waived if they are "not properly raised before the district court." *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 900 (9th Cir.2000).

The third prong of the associational standing test is prudential. *United Food*, 517 U.S. at 555-57 ("Resort to general principles, however, leads us to say that the associational standing test's third prong is a prudential one.").[4] Accordingly, a standing challenge based on this prong may be waived if it is not timely asserted or "if the time and manner" is merely "strategic." See *Pershing Park*, 219 F.3d at 900.[5]

Although Defendants did not object to associational standing until this recent Motion for Summary Judgment, that objection is timely raised in light of the circumstances of this case. Until this Motion, Plaintiffs had not identified any as-applied

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[4] The first two *Hunt* prongs "address[ ] the Article III requirements" for standing and cannot be waived. *United Food*, 517 U.S. at 555.

[5] Defendants argue that "the Ninth Circuit has not treated *Hunt's* third prong as waivable, instead reviewing challenges to associational standing ... even when standing had not been raised in the district court." (Reply 6 (citing *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1405 (9th Cir.1991) (analyzing associational standing as a form of constitutional standing, which cannot be waived)).) Since the Ninth Circuit's decision in *Associated General Contractors*, the Supreme Court ruled in *United Food* that *Hunt's* third prong is prudential and therefore may be waived. "[W]here intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority[,] ... district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003). Even if *Associated General Contractors* supports Defendants' assertion that associational standing cannot be waived, it has been effectively overruled by *United Food*.

challenges to non-Calvary courses.

[5]Accordingly, Defendants may challenge ACSI's associational standing.

b. *ACSI Does Not Have Associational Standing.*

Whether an organization satisfies the third *Hunt* prong depends on the claims it ***985** asserts and the relief it requests. The more specific claims and relief are to individual organization members, the less likely it is that the organization has standing. Courts are likely to grant associational standing where "the [l]aw does not require the participation of individual [association] members, [because] there is complete identity between the interests of the consortium and those of its member[s] ... and the necessary proof could be presented 'in a group context.' " *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 n. 4 (1988) (quoting *Hunt*, 432 U.S. at 344). Similarly, associational standing is often granted where the challenge raises a pure question of law that is not specific to individual members. *See Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25, 35 (1st. Cir.1990) (citing *Auto. Workers v. Brock*, 477 U.S. 274, 286 (1986)).

Both parties propose general rules in support of their positions. Plaintiffs argue that an organization generally holds associational standing if it brings suit for declaratory relief. (Opp'n 5 (" *Hunt* itself says (unanimously) that it is met by an association's constitutional claims in a declaratory and injunctive suit (such as this)....").) Defendants argue that an organization generally does not hold associational

standing if it brings an as-applied challenge. (MSJ 10 ("Courts in the Ninth Circuit have repeatedly held that organizations lack associational standing to bring as-applied constitutional claims, as opposed to facial claims.").)

Here, Plaintiffs seek declaratory relief on their as-applied claims. This challenge seemingly falls into both of the parties' general categories, leaving ACSI with and without standing. However, further inquiry into the claims asserted and relief requested reveals that ACSI does not have standing.

First, Plaintiffs' claim for declaratory relief is individualized. As an initial matter, Plaintiffs do not make clear what specific declaratory relief they seek regarding their as-applied claims. Defendants suggest that Plaintiffs seek an order that Defendants must reconsider (or perhaps approve) specific proposed courses. (MSJ 13.) Plaintiffs do not rebut this assertion.

[6]This individualized declaratory relief does not fit the mold of injunctive relief that Plaintiffs argue has been approved by the Supreme Court. Relying on *Hunt*, Plaintiffs argue that declaratory relief begets standing because " 'neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.' " (Opp'n 5 (quoting *Hunt*, 432 U.S. at 344.) Yet, the individualized nature of each course rejection inhibits any resolution "in a group context."

Plaintiffs' other Supreme Court quotation also

demonstrates why ACSI does not have associational standing. "[A]ssociational standing does not exist for damages suits because 'damages claims are not common to the entire membership, nor shared by all in equal degree'...." (Opp'n 5 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).) This reasoning applies equally to Plaintiffs' as-applied challenges. Individual course decisions "are not common to the entire membership." Relief would not be "shared by all in equal degree." Instead, each course decision affects only one ACSI school, and relief would benefit only that school.

Second, "the relief sought is only half the story." *Rent Stabilization Ass'n of City of N.Y. v. Dinkins*, 5 F.3d 591, 596 (2d Cir.1993). Even if Plaintiffs' individualized declaratory relief request did not prohibit associational standing, the individualized***986** nature of Plaintiffs' as-applied claims would bar standing. When the claims require an "ad hoc factual inquiry" for each member represented by the association, the organization does not have associational standing. *See Dinkins*, 5 F.3d at 596 (2d Cir.1993). For example, in *Rent Stabilization Ass'n*, an association representing landlords claimed that some of its members suffered takings as a result of the government's rent stabilization scheme. *Id.* at 592-93. This association sought declaratory relief. *Id.* at 596. Yet, the court denied associational standing because it "would have [had] to engage in an ad hoc factual inquiry for each landlord who allege[d] that he ha[d] suffered a taking" to determine whether a taking had occurred. *Id.*

Plaintiffs contend that the Ninth Circuit has allowed associational standing for as-applied challenges. However, the cases Plaintiffs cite in support of this proposition are distinguishable from the circumstances of this case. *See, e.g., Alaska Fish & Wildlife Fed'n & Outdoor Council,* [7]*Inc. v. Dunkle,* 829 F.2d 933, 937-38 (9th Cir.1987) (finding associational standing where members sought declaratory relief that two government agreements affecting all of Alaska were void).

Accordingly, ASCI does not have associational standing to pursue as-applied claims based on individual course rejections.

2. *Plaintiffs' Recently Disclosed As-Applied Claims and Evidence.*

Defendants also argue that they have been unfairly surprised because Plaintiffs did not raise most of their as-applied challenges until May 1, 2008 and failed to disclose nearly all of the expert opinions they rely on in their Opposition until June 18, 2008.

a. *Plaintiffs' Recently Disclosed Claims*

Defendants object that Plaintiffs failed to identify the specific course decisions that are the subject of their as-applied claims until May 1, 2008. Plaintiffs argue that they revealed the specific courses they seek to challenge through their Complaint, discovery, and prior motion for summary judgment.

First, Plaintiffs' Complaint only specifically

identifies courses proposed by Calvary. Second, Defendants served Plaintiffs with an interrogatory specifically asking Plaintiffs "to identify all courses at any ASCI-affiliated school for which Plaintiffs contend [course] approval was improperly refused." (Friedland Decl. Ex. 10.) Plaintiffs responded that "ACSI is aware of various courses at [Calvary] being rejected by UC, is aware of biology and history courses of Grace Baptist Schools of Redding, Cal. being rejected, is aware of biology courses of Calvary Baptist Schools of LaVerne, Cal. being rejected, and has heard of various other biology and physics courses being rejected by UC." (Friedland Decl. Ex. 10.) Plaintiffs failed to update or supplement this response.

In addition, Plaintiffs brought a motion for summary judgment on their facial and as-applied claims. Yet, Plaintiffs did not identify the specific courses it was challenging. Plaintiffs provided no argument on their as-applied claims, focusing only on their facial claims. Although Plaintiffs referred to a declaration containing a list of hundreds of courses, most of these courses were submitted by non-ACSI schools and the declaration did not purport to bring as-applied challenges to these courses. (Watters Decl. Apps. A-C.)

[8]Plaintiffs failed to disclose which non-Calvary courses they sought to challenge "as-applied." Although Defendants have always known which ACSI schools' courses UC had rejected, Defendants did not know which courses Plaintiffs sought to litigate. Defendants rejected more than 175 courses proposed by ACSI schools *987 during the relevant

time period. At no point, did Plaintiffs specify which of these 175 courses it would challenge through as-applied claims.

To hold that Defendants' knowledge of which courses were rejected is sufficient notice as to Plaintiffs' as-applied claims would have forced Defendants to prepare to defend every single rejection of an ACSI school's course. Defendants' experts would have had to evaluate 175 course descriptions in anticipation of trial.

Accordingly, Plaintiffs waived their as-applied claims as to courses not specifically identified.

b. *Plaintiffs' Recently Disclosed Expert Conclusions*

Defendants object that Plaintiffs present new expert testimony in support of their claims. Plaintiffs identified their as-applied challenges on May 1, 2008, and then asked their experts to provide opinions on the reasonableness of those course rejections. The newly acquired expert affidavits, in which the experts analyze each of Plaintiffs' 38 challenged course rejections, were signed by the experts on June 12, 2008 (Vitz), June 12, 2008 (Stotsky), June 9, 2008 (Behe), and June 13, 2008 (Guevara).

The discovery deadline passed on July 15, 2007. Federal Rule of Civil Procedure 26(a)(2)(C) required all expert discovery to be complete at least by August 21, 2007, 90 days before the trial date. (Docket No. 48.) One month after this expert discovery deadline passed, this Court continued the trial date

indefinitely in light of the massive volume of filings and issues presented by the first round of summary judgment motions. (Docket No. 145.) This continuance did not revive the discovery period for experts.

Nearly all of the relevant opinions in Plaintiffs' recently obtained expert affidavits were not disclosed in those experts' reports. Expert reports must contain "a complete statement of all opinions the witness will express and the basis and reasons for them" and the "data or other information considered by the witness in forming them." Fed.R.Civ.P. 26(a)(2)(B)(I)-(ii).

[9]Under Rule 37(c)(1), opinions not included in expert reports must be excluded unless the lack of disclosure was "substantially justified" or "harmless." Plaintiffs make no argument that their failure to disclose these opinions was justified. At oral argument, Plaintiffs conceded that they did not prepare for the as-applied challenges because they did not expect the Court to reach those claims. (Tr. of July 18, 2008 MSJ Hearing 17 ("Had the Court ruled that there were [discriminatory] policies, and that they were unconstitutional, the Court would never have had reason to get to particular courses."), 18 ("[F]rom our standpoint, the time for doing so had not come and would not come if your Honor ruled in our favor on our motion for summary judgment [as to our facial] claims.").)

Clearly, Defendants are prejudiced as they are unable to have their experts rebut the opinions of the Plaintiffs' experts. The sanction of exclusion is "a

self-executing, automatic sanction to provide a strong inducement for disclosure of material" and "gives teeth to [the Rule 26 disclosure] requirements...." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001) (internal quotation marks omitted).

Accordingly, Plaintiffs' recently acquired expert opinions will be excluded.

B. *Defendants' Substantive Arguments*

Remaining are Plaintiffs' as-applied challenges to four rejected Calvary courses and a Biology course identified in Plaintiffs' interrogatory response. Plaintiffs argue***988** that Defendants' decisions to deny approval for these courses violate the Free Speech Clause, Free Exercise Clause, Establishment Clause, and Equal Protection Clause. Each clause is addressed in turn.

1. *Free Speech Clause*

Plaintiffs primarily argue that Defendants engaged in viewpoint discrimination and content regulation prohibited by the Free Speech Clause. As discussed in the Prior Order, Defendants necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC. Therefore, the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course.

[10]a. *Animus*

Defendants argue that Plaintiffs waived any animus argument when Plaintiffs' counsel stated "We do not intend to argue the case based on proving animus" at the hearing on the parties' first round of summary judgment motions. (Tr. of Feb. 14, 2008 MSJ Hearing 39.) Plaintiffs dispute this argument, explaining that they did not intend to argue animus until this Court used that term to describe the punishment of disfavored viewpoints prohibited by *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Regardless of whether Plaintiffs waived this issue, they fail to present evidence of animus sufficient to raise a genuine issue of material fact. The prototypical example of government animus is found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).[6] There, the city council passed an ordinance prohibiting some, but not all, forms of animal killing so that members of the Santeria religion could not sacrifice animals during their worship ceremonies at a local church. "[T]he record ... compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the [city] ordinance," *id.* at 534, in part because of comments made at a city meeting at which the issue was addressed.

One councilman said that Santeria devotees "are

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[6] In a subsequent case, the Supreme Court characterized the animus in *Lukumi* as "manifest." *Locke v. Davey*, 540 U.S. 712, 724 (2004).

in violation of everything this country stands for" and another asked "[w]hat can we do to prevent the Church from opening?" *Id.* at 541. A city official told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons" and urged the city council "not to permit this Church to exist." *Id.* at 541-42. Also, the city attorney commented that the ordinance indicated that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

This evidence of animus demonstrated that the city used an ordinance that otherwise has a rational basis to punish a disfavored viewpoint. Similarly, Plaintiffs would have to show that Defendants rejected the challenged courses to punish religious viewpoints rather than out of rational concern about the academic merit of those religious viewpoints.

[11]Here, Plaintiffs provide no evidence of animus. Instead, Plaintiffs essentially argue that Defendants had no rational basis for their actions and therefore they must have been motivated by animus. This argument adds nothing to the constitutional analysis; if Defendants had no rational basis, the Court need not reach the issue of animus.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants' ***989** decisions to reject the courses challenged by Plaintiffs were not motivated by animus.

b. *Rational Basis Review*

Defendants' course approval decisions are subject to rational basis review. (Prior Order 37.) Under rational basis review, government regulation is "accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Rationality review "is not a license for courts to judge the wisdom, fairness, or logic of government regulation." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations."). "The burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) ("When conducting rational basis review the court will not overturn ... government action unless [it] is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.").

"When judges are asked to review the substance of a genuinely academic decision ..., they should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). "Plainly, [courts] may not override [this judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* Indeed, "restrained judicial review of the substance of academic decisions" enables

academic freedom to thrive. *Id.; see also id.* at 226 n. 12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself ....") (internal citations omitted).

[12]Plaintiffs challenge Defendants' decision to reject four Calvary courses and a non-Calvary Biology course.[7] To survive summary judgment, Plaintiffs must offer enough facts to create a genuine issue of material fact as to whether no rational basis existed to reject a course.

i. *Calvary's English Course-Christianity and Morality in American Literature*

Plaintiffs challenge Defendants' decision to deny approval for *Christianity and Morality in American Literature,* an English course submitted by Calvary. (*See* Pls.' Ex. 617; Costales Decl. Tab 1.)

This course proposed a primary text published by A Beka titled *Classics for Christians.* Jeanne Hargrove, a UC course reviewer, found this text inappropriate as a primary text in English because its "selection of works and pedagogical apparatus were inconsistent with ... expectations regarding critical thinking and broad exposure to writers' key works." (Hargrove Decl. ¶ 5.)

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[7] Although Plaintiffs identified two other courses in its interrogatory response, their list of as-applied claims does not include these courses and their Opposition does not address them.

Defendants' English expert, Professor Samuel Otter,[8] concurs, finding the text ***990** inadequate for a college-preparatory English class because it "fails to provide substantial readings and because it insists on specific interpretations [of those readings]" (Otter Decl. Ex. A, at 4.) "Such a combination contradicts the emphasis on analytical and critical thinking required [by the A-G Guidelines]." (Otter Decl. Ex. A, at 7.) These deficiencies rendered the text inadequate to provide "analytical and critical skills." (Otter Decl. Ex. A, at 4.) Further, Professor Otter specifically notes that the text's failures are "not because it offers a 'Christian and civic' perspective on its materials...." (Otter Decl. Ex. A, at 4.)

In addition, the primary text is an "anthology of excerpts," which UC does not approve, no matter the content of the excerpts. "College-preparatory courses are expected to require students to read full-length works." (Lynch Decl. No. 1 Ex. 2, at 5.) Plaintiffs' English expert, **[13]**Dr. Sandra Stotsky,[9] agreed in her deposition that a general rule against anthologies of excerpts is reasonable. (Lynch Decl. No. 2 Ex. 104.)

Plaintiffs offer little admissible evidence to the

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[8] Professor Otter has taught American literature for sixteen years at the University of California, Berkeley. (Otter Decl. Ex. A, at 3.)

[9] Dr. Stotsky is an independent researcher and consultant in education. She received her doctorate in reading research and reading education from the Harvard Graduate School of Education and serves on the National Mathematics Advisory Panel. (Stotsky Decl. Ex. I.)

contrary. Dr. Stotsky submitted a declaration comparing the viewpoints of several English texts, including the A Beka anthology. (Watters Decl. Ex. W.) However, she does not refute Professor Otter's conclusions that the text is inappropriate for college-preparatory work and insists on specific interpretations of its content. Dr. Stotsky also does not opine that Defendants unreasonably rejected this course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed English course.

ii. *Calvary's History Course-Christianity's Influence on America*

Plaintiffs challenge Defendants' decision to deny approval for *Christianity's Influence on America*, a History course submitted by Calvary. (*See* Pls.' Ex. 607.)

This course proposed a primary text published by Bob Jones University ("BJU") titled *United States History for Christian Schools*. (Pls.' Ex. 607, at 11.) [10] Professor James Given, while on the UC course review committee, reviewed this text and concluded

[10] Plaintiffs argue that this course proposed "a secular text as well as the [BJU] textbook, and those secular texts ensured that standard content and required skills were taught." (Opp'n 17 (internal citations omitted).) The only other text listed on the course description is *Pilgrims in Their Own Land: 500 Years of Religion in America*. Plaintiffs offer no admissible evidence for their contention that this "secular text ensured that standard content and required skills were taught."

that the text failed to adequately teach critical thinking and modern historical analytic methods. Professor Given reached this conclusion because the text:

> instructs that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their contributions based on their religious motivations or lack thereof and contains inadequate treatment of several *991 major ethnic groups, women, and non-Christian religious groups.
> [14](Given Decl. ¶ 8.)

Defendants' History expert, Professor Gary Nash,[11] concurred with Professor Givens' evaluation, finding that the text should not be used as the primary text for a college-preparatory History course. (Nash Decl. Ex. A, at 6.) Specifically, Nash found that the text failed to encourage "historical thinking skills and analytical thinking" and failed to cover "major topics, themes, and components of United States history." (Nash Decl. Ex. A, at 6.)

"From reading the [reviewed text], students will have little opportunity to exercise independent judgment, to sharpen their critical thinking skills, or to consider multiple perspectives of those who made our history." (Nash Decl. Ex. A, at 9.) These students

[11] Professor Nash has taught History at the University of California, Los Angeles for "nearly forty years." (Nash Decl. Ex. A, at 3.)

"will have difficulty understanding history as a discipline as it has been practiced since Herodotus and Thucydides-a never-ending quest to reconstruct the past based on new evidence and informed by new questions posed about the functioning of past societies." (Nash Decl. Ex. A, at 9.)

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' History expert, Professor Paul Vitz, submitted a declaration concluding that the BJU text covers the "basic facts, events, and issues of [United States] history...." (Watters Decl. Ex. X ¶ 34.) However, he does not refute Professor Given's and Professor Nash's conclusions that the text fails to teach historical analytic methods. Professor Vitz also does not opine that Defendants unreasonably rejected the course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed History course.

iii. *Calvary's Government Course-Special Providence: Christianity and the American Republic*

Plaintiffs challenge Defendants' decision to deny approval for *Special Providence: Christianity and the American Republic*, a Government course submitted by Calvary. (*See* Pls.' Ex. 608.)

[15]This course proposed a primary text published by BJU titled *American Government for Christian Schools*. (Pls.' Ex. 608, at 37.) The UC reviewer found that "the content of the course outline[ ] ... is not consistent with the empirical

historical knowledge generally accepted in the collegiate community." (Costales Decl. Tab 3.)

Defendants' Government expert, Professor Mark Petracca concurred,[12] evaluating the BJU Government text and finding that "[u]se of this [text] as the principal text in a United States Government course will not provide adequate preparation for study at UC." (Petracca Decl. Ex. A, at 2.) Professor Petracca found that the BJU Government text does not acknowledge the commonly-accepted framework for scholarly analysis and provides little opportunity for critical thinking. (Petracca Decl. Ex. A, at 2.) In addition, the text contains "many factual and empirical assertions that are not generally accepted among political scientists [or] historians and that are nevertheless not substantiated within the text by evidence." (Petracca Decl. Ex. A, at 3.)

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Government expert, Professor Vitz, submitted a declaration***992** concluding that the BJU Government text "appear[s] to give a reasonably adequate presentation of the basic subject matter-the nature of the American government...." (Watters Decl. Ex. X ¶ 55.) However, he does not refute Professor Petracca's conclusions that the text does not acknowledge the commonly-accepted framework for scholarly analysis and contains factual and empirical assertions that are not generally accepted. Professor Vitz also does not

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[12] Professor Petracca has served for nine years as the Chair of the Department of Political Science at the University of California, Irvine. (Petracca Decl. Ex. A, at 4.)

opine that Defendants unreasonably rejected the course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed Government course.

iv. *Calvary's Elective Course-World Religions*

Plaintiffs challenge Defendants' decision to deny approval for *World Religions*, an elective course submitted by Calvary.

[16]Defendants rejected this course for both History and elective credit. The feedback provided to Calvary regarding this course is telling. As an initial matter, Defendants rejected the course as an elective because the course was "intended for 9-12th graders and does not have a prerequisite...." (Costales Decl. Tab 4, at 54.) Defendants noted that this deficiency could be corrected by "redesign[ing] the course for 11th/12th graders only" or "add[ing] an appropriate prerequisite." Plaintiffs do not argue that these bases for rejection are irrational.

In addition, Defendants noted three substantive deficiencies in the course description and offered to approve the course if Calvary clarified these issues. (Costales Decl. Tab 4, at 54.) First, Defendants could not confirm that the proposed text, *World Religions* by Dan Halverson, existed, and asked Calvary to accurately identify the text. Second, Defendants asked Calvary to provide further information about key assignments. Finally, Defendants asked Calvary to demonstrate how the course treats the study of

religion from the standpoint of scholarly inquiry. Defendants' religion expert, Professor Robert Sharf,[13] testified that these decisions were reasonable.

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' religion expert, Professor Daniel Guevara, offers no opinion specific to this course. (Watters Decl. Ex. H.) Further, Plaintiffs offer nothing to refute Defendants' evidence that it had a rational basis for rejecting the course completely unrelated to its subject matter. Finally, the course rejection feedback makes clear that the course may have been approved with minimal clarification. Plaintiffs provide no evidence that Calvary attempted to clarify the course content and received a second rejection.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed elective course.

v. *The Non-Calvary Biology Course*

Plaintiffs challenge Defendants' decision to deny approval for the Biology course submitted by Calvary Baptist School. Although Calvary Baptist has a similar name, it is not the same school as Calvary.

[17]This course proposed a primary text published by A Beka titled *Biology: God's Living*

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[13] Professor Sharf is the Director of Religious Studies at the University of California, Berkeley. (Sharf Decl. Ex. A, at 3-4.)

Creation. (Pls.' Ex. 624, at 40.) UC Professor Barbara Sawrey reviewed this text and concluded that it was inappropriate***993** for use as the primary text in college-preparatory science classes. (Sawrey Decl. ¶ 3.) Professor Sawrey found the text problematic because it characterized religious doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical thinking, and took an "overall un-scientific approach to the subject matter." (Sawrey Decl. ¶ 3.) [14]

Sawrey's "judgment was based not on the fact that the textbooks contained religious references and viewpoints, but on [her] conclusion that [the texts] would not adequately teach students the scientific principles, methods, and knowledge necessary for them to successfully study those subjects at UC." (Sawrey Decl. ¶ 3.) [15] After forming her conclusions,

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[14] The UC Position Statement on Science Courses reflects these concerns:

> The texts in question are primarily religious texts; science is secondary.... Courses that utilize these texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary. Students who [are] taught to discount the scientific process and the scientific conclusions validated by a wealth of scientific research are not being provided with an understanding of scientific principles expected by the UC faculty.

(Wilbur Decl. No. 2 Ex. 2.)

[15] Similarly, some Christian schools have declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit. (Lynch Decl. No. 1 Exs. 47B ("[Valley Christian School] felt that the A Beka books ... did not represent the same level of academic rigor as we could find in some other texts."), 47C ("[Patten Academy declined to use A Beka and BJU textbooks] because they didn't provide the content that the

Professor Sawrey shared her findings with other members of the course review committee, who supported her conclusions. (Sawrey Decl. ¶ 4.)

Defendants' biology experts, Professors Donald Kennedy [16] and Francisco Ayala,[17] reviewed the A Beka text and a second Biology text published by BJU and concurred in her judgment. [18]Professor Kennedy determined that "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible ... both texts fail to encourage critical thinking and the skills required for careful scientific analysis." (Kennedy Decl. Ex. A, at 8.) Professor Ayala found that the texts "reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." (Ayala Decl. Ex. A, at 4.)

Both professors concluded that neither the A Beka nor the BJU Biology texts are appropriate for use as the principal text in a college preparatory biology course. (Ayala Decl. Ex. A, at 28; Kennedy

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principal and faculty believed would prepare the youngsters to meet their post-high school goals."); *cf.* Lynch Decl. No. 1 Ex. 47A ("[Oaks Christian School] acknowledge[s] that there was a much fuller treatment of evolution in the secular book that [it] used [than the BJU biology textbook, which it did not use].").)

[16] Professor Kennedy, the editor-in-chief of *Science* magazine, teaches biology at Stanford University, where he once served as President of the University. (Kennedy Decl. Ex. A, at 4-5.)

[17] Professor Ayala teaches biological sciences at University of California, Irvine. (Ayala Decl. Ex. A, at 4.)

Decl. Ex. A, at 20.) In making this finding, Professor Kennedy reiterated Professor Sawrey's initial conclusion that "the problem is not ... that the creationist view is taught as an alternative to scientific explanations, but that the nature of science, the theory of evolution, and critical thinking are not taught adequately." (Kennedy Decl. Ex. A, at 7.)

*994 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Biology expert, Dr. Michael Behe, submitted a declaration concluding that the BJU text mentions standard scientific content. (Watters Decl. Ex. U.) However, Professor Behe "did not consider how much detail or depth" the texts gave to this standard content. (Watters Decl. Ex. U ¶ 4.) Therefore, Professor Behe fails to refute one of Professor Kennedy's primary concerns that the nature of science, the theory of evolution, and critical thinking are not taught adequately.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary Baptist's proposed Biology course.

2. *Free Exercise and Establishment Clauses*

In their prior summary judgment motion, Plaintiffs argued that Defendants exhibited unconstitutional "hostility" toward religion, identifying 14 allegedly hostile acts that did not quite qualify as facial challenges.

Nine of these acts were allegedly

unconstitutional symbolic burdens in violation of the Establishment Clause. In the Prior Order, this Court determined that these nine acts were not [19]unconstitutional symbolic hostility under the Establishment Clause. (Prior Order 44-47.) That analysis still controls.[18]

The remaining five acts allegedly burdened Plaintiffs' religious practices in violation of the Free Exercise Clause. In the Prior Order, this Court determined that two of these alleged acts were not supported by any evidence and that Plaintiffs failed to show that two other acts had burdensome consequences. (Prior Order 47-48.) That analysis still controls.

Accordingly, only one allegedly hostile act remains before the Court-"[UC] reviewers all wrote that religion courses taught by Cantwell/Sacred Heart of Mary should be rejected because they taught a single perspective." (Prior Order 48.) Because this allegedly burdensome hostile act must be analyzed under the Free Exercise Clause, Plaintiffs must show that Defendants had no rational basis for the course rejection or that Defendants rejected the course because of animus.

As mentioned above, Plaintiffs provide no evidence of animus similar to the facts in *Lukumi*. In addition, Plaintiffs provide no expert testimony that this course was irrationally rejected. Because

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[18] Despite this analysis, the Court did not previously grant summary judgment in favor of Defendants on this issue solely because Defendants had not moved for summary judgment on these claims.

Plaintiffs fail to raise a genuine issue of material fact, Defendants are entitled to summary judgment on this claim.[19]

3. *Equal Protection Clause*

As discussed in the Prior Order, claims based on religious discrimination that survive the *Lemon* test are subject to rational basis scrutiny under the Equal Protection Clause. (Prior Order 36-37 (citing *Locke v. Davey*, 540 U.S. 712, 720 n. 3 (2004); *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974)).)

[20]Because Defendants' course decisions survive rational basis scrutiny (*see* Part ***995** II.B.1.b of this Order), Defendants are entitled to summary judgment on Plaintiffs' as-applied equal protection claims.

III. *RULING*

Because Plaintiffs fail to raise any genuine issue of material fact to support their as-applied claims, Defendants' Motion is GRANTED.

IT IS SO ORDERED.

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[19] To the extent Plaintiffs claim that specific course rejections violate the Free Exercise Clause or Establishment Clause, Plaintiffs provide no analysis in addition to its arguments under the Free Speech Clause. The Court's conclusion that the course rejections were rationally based and not motivated by animus defeats Plaintiffs' challenge under the Free Exercise Clause and Establishment Clause.

APPENDIX C

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (MANx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., V. ROMAN STEARNS, ET AL.,

March 28, 2008

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [Docket Nos. 70 & 71]

S. JAMES OTERO, District Judge.

This matter is before the Court on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment, both filed on August 27, 2007. Oppositions and Replies have been filed as to both Motions. After hearing argument on February 14, 2008 and carefully considering all admissible documents and the arguments made in support of and in opposition to each Motion, the Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendants' Motion for Partial Summary Judgment.

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[1]*1088 I. *BACKGROUND*

Defendants are the University of California ("UC") employees responsible for developing and implementing the admissions policy by which applicants are selected to attend UC.[1] Plaintiffs are the Calvary Chapel Christian School ("Calvary"), five Calvary students, and the Association of Christian Schools International ("ACSI").

Plaintiffs have brought suit against Defendants, alleging that the UC admissions policy is

[1] These UC employees are Roman Stearns (Special Assistant to the UC President), Susan Wilbur (Director of Undergraduate Admissions), Robert Dynes (UC President), Michael Brown (former Chair of the Board of Admissions and Relations with Schools ("BOARS")), and Judy Sakaki (Vice President for Student Affairs).

unconstitutional under the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.

A. *The UC Admissions Process*

Each year, UC must decide which of California's more than 360,000 high school graduates will be admitted to attend one of UC's ten campuses. (Defs.' MSJ 2.) California applicants are admitted to UC only if they qualify through one or more of the following four "Paths":

Path 1: By meeting specified requirements for coursework, grade point average, and test scores.

Path 2: By ranking in the top four percent at participating California high schools.

Path 3: By scoring exceptionally high on standardized tests.

Path 4: By demonstrating the potential to succeed at UC despite not falling in any other category.

(Lynch Decl. No. 1 Exs. 1 (describing Paths 1, 2, and 3), 19 (describing Path 4).)

About eighty-two percent of California applicants who are admitted to UC qualify only through Path 1 or Path 2. (Pls.' Exs. 62, 64.) [2]To qualify through

[2] More than sixteen percent of California students admitted to UC score high enough on standardized tests to qualify through Paths 1, 2, and 3. (Pls.' Ex. 64, at 68.) Only one percent are admitted to UC solely through Path 3 (Pls.' Ex. 62,

Path 1 or 2, the applicant must demonstrate proficiency in seven specific subjects: (a) history and social science; (b) English; [2](c) mathematics; (d) laboratory science; (e) foreign languages; (f) the visual or performing arts; and (g) electives. (Lynch Decl. No. 1 Exs. 4, 17.) UC refers to these seven subjects as the "A-G Subjects."

A student may demonstrate proficiency in an A-G Subject by achieving a sufficiently high grade or score:

(a) in UC-approved high school courses;

(b) in a college course at an accredited university;

(c) on the corresponding SAT II subject test; or

(d) on the International Baccalaureate or Advanced Placement exam.

(Wilbur Decl. ¶ 8.) Nearly all of the applicants qualifying through Paths 1 and 2 demonstrate proficiency in the A-G Subjects by taking UC-approved high school courses. (Defs.' MSJ 4.) Plaintiffs' constitutional claims center on UC's method for approving high school courses.[3]

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at 41.) Another one percent of students are admitted solely through Path 4. (Pls.' Ex. 65, at 180.)

[3] Plaintiffs erroneously argue that the UC course review process "render[s] Christian school students ineligible for ninety-eight percent of the seats in the entering class" because of rejected Christian school courses. (Pls.' MSJ 29.) Even setting aside that students have alternative ways to demonstrate proficiency in the A-G Subjects, eighteen percent of California students are admitted without needing to demonstrate proficiency (not two percent, as Plaintiffs contend).

*1089 B. *The A-G Guidelines*

For an applicant to demonstrate proficiency in the A-G Subjects through high school courses, she must take a minimum number of UC-approved courses. The number of courses a student must take to demonstrate proficiency varies by subject, ranging from a year-long course in the arts to four year-long courses in English. (Lynch Decl. No. 1 Ex. 4.)

UC requires applicants to take approved courses "to make [the UC] eligibility standards substantively meaningful and to ensure that the students whom it guarantees a spot have earned their relevant grades in courses that are sufficiently rigorous to prepare the students for study at UC." (Defs.' MSJ 2 (citing Rashid Decl. ¶ 7).)

[3]High schools seeking course approval must provide UC with a satisfactory course description. (Defs.' Opp'n 6; *see also* Lynch Decl. No. 2 Ex. 93.) The typical course description is three to five pages in length. (Pls.' MSJ 2.) UC evaluates this course description in light of the A-G Guidelines, which provide about one page of general principles per

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Further, if ninety-eight percent of Christian school students were ineligible, Plaintiffs should be able to identify a significant number of students excluded from UC because of the course review process. Yet, "Plaintiffs do not show, and there is no evidence, that even one ACSI student has been denied UC eligibility as a result of any actions challenged" in this case. (Defs.' Opp'n 4.)

subject area (Pls.' Ex. 61) and hundreds of pages of examples of approved course outlines for each subject (Lynch Decl. No. 1 Ex. 2).

In deciding whether to approve a course, UC reviews the submitted course descriptions to determine whether the course challenges students academically, involves substantial reading and writing, teaches critical thinking skills, emphasizes both analytical thinking and factual content, and develops students' oral and listening skills. (Lynch Decl. No. 1 Ex. 6, at 4; Wilbur Decl. ¶ 10.) UC also seeks to ensure that the course will sufficiently prepare students for UC study. (Lynch Decl. No. 1 Ex. 6, at 4.) Courses that meet these standards are approved.

However, UC will not approve courses that "fail[ ] to teach topics with sufficient accuracy and depth" or "fail[ ] to teach relevant analytical thinking skills." (Defs.' Opp'n 7.)

Occasionally, UC reviews individual textbooks where the subject area is one where "selected texts tend strongly to guide course content" (such as history, mathematics, and science) and the "course outline[ ] raise[s] concerns about whether the course meets faculty guidelines ...." (Pls.' Ex. 241.) UC does not interview the teachers, observe classroom instruction, or test the students. (Pls.' MSJ 2.) UC does not review courses taken by applicants from out-of-state high schools (Pls.' MSJ 2), which comprise approximately fourteen percent of the applicant pool and about nine percent of admitted students (Pls.' Ex. 80; Wilbur Decl. No. 2 ¶ 53).

C. The "A-G Policies"

Plaintiffs allege that Defendants, in applying the A-G Guidelines, have established a set of binding "A-G Policies" that are used to routinely deny courses submitted by religious high schools. The official-sounding term "A-G Policies" is a label Plaintiffs created to describe what they believe are secret rules by which Defendants deny Plaintiffs' courses. (Pls.' Opp'n 3.) The extent to which these "A-G Policies" exist is discussed in Part II.A of this Order.

[4]Plaintiffs contend that "[t]hese policies require rejection of courses, regardless of their standard content, that add a single religious viewpoint, any instance of God's ***1090** guidance of history, or any alternative ... to evolution." (Pls.' Reply 1.)

As evidence of these "policies," Plaintiffs submit numerous UC Position Statements regarding the A-G Guidelines. For example, the UC Position Statement concerning history courses notifies Christian schools that they "can develop and submit for UC approval a secular history curriculum with a text and course outline that addresses course content / knowledge generally accepted in the History / Humanities / Social Sciences community." (Pls.' Ex. 242.)

Further, Plaintiffs contend that Defendants use form language when rejecting a course because of religious perspectives. For example, when UC rejects a religious school's biology course, it notifies the

school that "[t]he content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community." (Pls.' Exs. 1, 246, 305.)

Finally, Plaintiffs rely on the depositions of multiple witnesses who are responsible for reviewing courses or otherwise interpreting the A-G Guidelines. Plaintiffs claim that these depositions reveal that "UC follows a policy rejecting any course in any subject, even if it teaches standard content, if it adds teaching of the school's religious viewpoint." (Pls.' MSJ 6 (citing the depositions of Susan Wilbur, Robert Sharf, James Given, Gary Nash, Mark Petracca, and Francisco Ayala).)

Plaintiffs assert that religious school courses are approved at a lower rate than secular school courses because of these discriminatory policies. For example, for the 2004 school year, 56.3 percent of courses submitted by Christian schools were approved (Pls.' Ex. 287, at 928), while 86.3 percent of courses submitted by secular schools were approved (Pls.' Exs. 286-87). Defendants disagree, providing evidence that religious school courses are denied at about the same rate as other secular private schools. (Wilbur Decl. No. 2 Ex. 1 (graphing course approval rates for various categories of schools, including ACSI schools, "non-Catholic" private schools, and public schools).)

[5]Defendants admit to creating UC Position Statements and form rejection language, but deny Plaintiffs' assertion that UC has a policy of "den[ying] students a-g credit for otherwise

acceptable courses that teach standard content and that add religious viewpoints...." (Defs.' Opp'n 1.)

D. *The Parties' Motions for Summary Judgment*

Now, both parties move for summary judgment. Plaintiffs seek summary judgment that the UC course review process is unconstitutional on its face and as applied to Plaintiffs. Defendants seek summary judgment on Plaintiffs' facial claims, reserving for trial their proof that they constitutionally applied their regulations to Plaintiffs' courses.

II. *DISCUSSION*

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A "material" fact is one that could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evaluating a motion for summary judgment, the Court "construes the evidence in the light most favorable to the nonmoving party." *1091 *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir.2005).

Plaintiffs argue that the UC course review process on its face and as applied to Plaintiffs' courses is unconstitutional because the review process:

(1) discriminates against religious viewpoints and regulates speech based on content;

(2) is overbroad;

(3) provides course reviewers with "unbridled discretion";

(4) shows "hostility toward religious schools";

(5) prescribes what shall be orthodox in religion; and

(6) abridges equal protection.

[6]Plaintiffs' six claims require examination of the A-G Guidelines and the purported "A-G Policies" under the Free Speech Clause, the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

A. *The Scope of Plaintiffs' Facial Challenge*

The parties disagree as to the scope of Plaintiffs' facial challenge. Defendants argue that a facial challenge is limited to the text of the A-G Guidelines, while Plaintiffs contend that a facial challenge must include analysis of the A-G Policies. Neither party supports its argument with legal authority.

In some circumstances, courts have considered the government's authoritative interpretation of its guidelines and ordinances in a facial challenge. *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir.2006); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."). "To affect the constitutional analysis, [an authoritative interpretation] must 'be made explicit by textual incorporation, binding judicial or administrative construction, or **well-established practice.**' " *Food Not Bombs*, 450 F.3d at 1035 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)).

Through significant documentation and testimony, Plaintiffs have shown that Defendants have a well-established practice of using policies outside of the A-G Guidelines to evaluate courses. Defendants have created UC Position Statements and form language rejection letters by which they consider themselves bound. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) ("[T]he city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement."); *cf. Lakewood*, 486 U.S. at 770 ("This Court will not write nonbinding limits into a silent state statute.").

In addition, Plaintiffs ask the Court to find that Defendants have three specific A-G Policies.

[7]1. *The "Single Religious Viewpoint Policy"*

First, Plaintiffs contend that Defendants have a policy of rejecting courses that contain standard content, but add a single religious viewpoint. (Pls.' MSJ 6; Pls.' Opp'n 2; Pls.' Reply 1.) Yet, the evidence establishes otherwise.

Defendants have approved many high school courses that include religious material and viewpoints, including courses such as "The Prophetic Voice" (Hargrove Decl. Ex. 3, at 430), "Western Civilization: The Jewish Experience" (Hargrove Decl. Ex. 6, at 574), and "The Bible as Literature" (Hargrove Decl. Ex. 3, at 535). Western Christian Academy submitted its "Language***1092** Arts 12" course for approval as an English course. (Hargrove Decl. Ex. 3, at 459.) This course relies on a Christian textbook published by Alpha Omega Publications. (Hargrove Decl. Ex. 3, at 461.) The course description includes assignments such as "Write an essay on the Christian view of nature as demonstrated in Jesus' use of elements of nature in His parables" and "Write an essay contrasting the Byronic manner of facing guilt with the way the Bible says Christians should deal with guilt." (Hargrove Decl. Ex. 3, at 462.) Despite its religious content, this course was approved. (Hargrove Decl. ¶ 10.)

Although Defendants disapprove of some Christian "science" textbooks that "prioritize religion over science" when used as the primary or sole text in an A-G Subject course (Hargrove Decl. ¶ 10), they do approve many courses that utilize these texts as

secondary texts (Hargrove Decl. ¶ 14; Wilber Decl. No. 2 ¶ 7). [4]Further, Defendants reviewed and approved some Christian textbooks for use as the primary or sole text, including *Chemistry for Christian Schools* and *Physics for Christian Schools.* (Pls.' Ex. 100.) This indicates that Defendants are not withholding approval solely because the course includes a religious viewpoint.

For example, Defendants have approved biology, physics, and chemistry courses using Christian texts, including a chemistry course taught at Calvary that utilized two texts-*Modern* **[8]***Chemistry and Chemistry for Christians* (Hargrove Decl. Ex. 5, at 565) and a biology course taught by Kings Christian High School that utilized three texts-*Biology: God's Living Creation, Biology,* and *Health Biology* (Hargrove Decl. Ex. 3, at 540-44).

Finally, Defendants provide declarations from religious school administrators who have not perceived the discrimination about which Plaintiffs complain. For example, the Assistant Principal for Curriculum at Loyola High School of Los Angeles, a self-described "Jesuit College Preparatory" school, does not believe that "UC discriminates against Catholic high schools by denying [A-G course approval] for courses that otherwise meet UC's academic standards but that add religious content or a religious viewpoint." (Kozakowski Decl. ¶¶ 5-6, 9.)

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[4] However, not all courses restricting use of Christian texts to supplemental status are approved. If the supplemental text "interfere[s] with the students' acquisition of the knowledge, understanding, and skills that UC expects [the student] to have gained," the course may not be approved. (Hargrove Decl. ¶ 10.)

Also, the Director of College Guidance at New Community Jewish High School notes that "[i]n [his] experience, UC has treated New Community and its students fairly and in a non-discriminatory manner." (Lindner Decl. ¶¶ 6-8.) Even administrators at schools that are members of ACSI have admitted that "I can't think of any areas where I felt-I feel like Valley Christian has been treated differently because we're a Christian institution compared to any other school." (Lynch Decl. No. 2 Ex. 115.) Although such anecdotal evidence is of minimal value, it does lend some support to Defendants' assertion that they hold *all* schools-religious or secular-to the same rigorous standards.

The evidence establishes that Defendants do not have a policy of rejecting courses solely because the courses add a religious viewpoint. Plaintiffs provide no evidence of an actual policy. Instead, Plaintiffs rely on the existence of course rejections and abstract hypothetical situations posed to course reviewers and experts, and ask the Court to draw an inference of a "policy" that can be challenged facially.

***1093** For example, Plaintiffs cite the deposition of Defendants' government expert as evidence that "UC follows the policy of rejecting any course in any subject, even if it teaches standard content, if it adds teaching of the school's religious viewpoint." (Pls.' MSJ 6.) The actual deposition testimony illustrates Plaintiffs' error. Defendants' government expert,

Professor Mark Petracca, [5][9]testified that any government course that presents a "single, unassailable standard for evaluating government, truth, civic and political leaders, culture, and justice" would not be considered "conventional social science" and fails to "prepare students adequately for study at UC." (Petracca Dep. 20-21.) Professor Petracca explains in his expert report that a "single, unassailable standard," regardless of its perspective, contradicts "the pluralistic and inquisitive approach" to the study of government "used by professors and expected of students at UC." (Petracca Decl. Ex. A, at 2.)

Indeed, Petracca elaborates that "I am not saying, either here or elsewhere, that it is inappropriate for the textbook or a course to present a Bible-based or Christian perspective on American government." (Petracca Decl. Ex. A, at 3.) However, it is inappropriate for a college preparatory government course to present a single perspective in a manner that fails to even acknowledge that other analytical frameworks exist. (Petracca Decl. Ex. A, at 3.)

Upon inspection, Plaintiffs' conclusion premised on a few lines of Professor Petracca's deposition does not hold. Petracca's deposition testimony is completely consistent with his expert report.[6] Plaintiffs must show more than the "mere existence

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[5] Professor Petracca has served for nine years as the Chair of the Department of Political Science at the University of California, Irvine. (Petracca Decl. Ex. A, at 4.)

[6] Similarly, Plaintiffs' "evidence" based on other depositions does not withstand even the slightest scrutiny.

of a scintilla of evidence ...; there must be evidence on which the jury could reasonably find" for Plaintiffs. *See Anderson*, 477 U.S. at 252; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[Plaintiffs] must do more than simply show that there is some metaphysical doubt as to the material facts....").

Accordingly, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting courses that contain standard content, but add a single religious viewpoint.

2. *The "History and Social Science Policy"*

Second, Plaintiffs contend that Defendants have a policy of rejecting history and social science courses that "add a Christian god" or that are "limited to one denomination or viewpoint." **[10]**(Pls.' MSJ 9-13.) To the contrary, Defendants provide evidence of approved history courses taught from the perspective of a single religious denomination. (Wilbur Decl. No. 2 ¶¶ 33, 42; Hargrove Decl. ¶ 16, Ex. 6.) In addition to the "Western Civilization: The Jewish Experience" course described above, UC approved courses such as Sierra Christian Academy's "World History" course, which seeks to "understand[ ] and appreciate[ ] the beginnings of Western Civilization from a Judeo-Christian point of view" (Hargrove Decl. Ex. 6, at 592), and Valley Christian High School's "Ancient World History" course, which "cover[ ]s the time frame of *Creation* through the Reformation" (Hargrove Decl. Ex. 6, at 597 (emphasis added)).

*1094 Further, Defendants explain that the mention of God in the explanation of a historical event does not "automatically disqualify a course for approval." (Given Decl. ¶ 5 (noting that supernatural-based explanations of history do not "automatically disqualify a course for approval," but "excessive reliance" on these explanations may prevent approval).) Rather, the focus is on whether the course as a whole meets the UC standards. (Wilbur Decl. No. 2 ¶ 32 ("[T]he mention of God as the explanation of [a] historical event may or may not cause rejection of a course for [history] credit, depending on whether the course, as a whole, meets the UC faculty's expectations for college preparatory history....").)

Again, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting history courses because they "add a Christian god" or "one religious perspective."

3. *The "Science Policy"*

Finally, Plaintiffs contend that Defendants have a policy of rejecting biology courses that, in addition to evolution, contain topics such as theistic evolution, intelligent design, creation, or weaknesses of evolution. (Pls.' MSJ 13-17.) Again, Defendants deny this allegation, explaining that biology courses may include scientific discussion of the weaknesses of evolution, creationism, or intelligent design. (Wilbur Decl. No. 2 ¶ 43 ("A biology course could be approved for [science] credit if it included both an adequate treatment of the theory of evolution and discussion of

creationism.").) For example, biology courses that use Christian texts that discuss perceived weaknesses of evolution, creationism, and intelligent design as *supplemental* texts can and have **[11]**been approved. (Wilbur Decl. No. 2 ¶ 7; Hargrove Decl. Ex. 3, at 540-44 (approving Kings Christian High School's biology course, which used A Beka's *Biology: God's Living Creation* as a supplemental text).)

Once more, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting biology courses that add theistic evolution, intelligent design, creation, or weaknesses of evolution.

In evaluating Plaintiffs' facial challenge, the Court will consider the A-G Guidelines, the UC Position Statements, and form rejection language (collectively referred to as the "A-G Guidelines and Policies").

B. *Plaintiffs' Facial Constitutional Claims*

Plaintiffs have brought a variety of constitutional claims against Defendants. They claim that the A-G Guidelines and Policies are unconstitutional on their face because these regulations violate rights guaranteed to religious schools under:

(1) the Free Speech Clause;

(2) the Free Exercise Clause;

(3) the Establishment Clause; and

(4) the Equal Protection Clause.

Each clause is addressed in turn.

1. *The Free Speech Clause*

Plaintiffs allege that the A-G Guidelines and Policies abridge their freedom of speech because the regulations: (1) discriminate based on viewpoint and content; (2) are overbroad; and (3) grant Defendants unbridled discretion.

a. *Viewpoint Discrimination and Content Regulation*

Plaintiffs vigorously attack the A-G Guidelines and Policies as viewpoint discrimination and content regulation. According to Plaintiffs, "UC policies, confirmed by hundreds of course rejections, discriminate by viewpoint and are content-based in regulation." (Pls.' Reply 3.) ***1095** Plaintiffs' briefs rely on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and other public forum cases as the cornerstone of their argument, insisting that **[12]**" '[v]iewpoint discrimination is ... an egregious form of content discrimination' " (Pls.' MSJ 4 (quoting *Rosenberger*, 515 U.S. at 829)) and that " '[d]iscrimination against speech because of its message is presumed to be unconstitutional' " (Pls.' MSJ 21 (quoting *Rosenberger*, 515 U.S. at 828)).[7]

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[7] At oral argument, Plaintiffs identified three additional "keystone cases" in support of their argument that were not included in their brief: (1) *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); (2) *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,

Yet, not all content-based regulations are subject to strict scrutiny. [8] The Supreme Court has repeatedly rejected a heightened standard where the government is providing a public service that by its nature requires evaluations of, and distinctions

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547 U.S. 47 (2006); and (3) *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). (Tr. Hr'g 21.) Plaintiffs only discussed one of these cases in depth during its argument *Southworth*, which is easily distinguished from the present case.

In *Southworth*, the University of Wisconsin used student fees "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229; *see also id.* at 222-23 ("In the University's view, the activity fees 'stimulat[ed] advocacy and debate on diverse points of view'...."). Accordingly, the Supreme Court found its "public forum cases are instructive by close analogy." Id. at 229-30.

Here, high school courses serve UC by preparing students for academic study, not by "facilitating the free and open exchange of ideas." The close analogy to a public forum in *Southworth* is missing in this case. Similarly, the need for content-based judgments present in this case is missing in *Southworth*. Perhaps the most relevant portion of the *Southworth* opinion is Justice Kennedy's pronouncement that began his legal analysis: "It is inevitable that government will adopt and pursue programs and policies *within its constitutional powers* but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." *Id.* at 229 (emphasis added).

[8] Plaintiffs spend much of their briefing setting up a "viewpoint discrimination" straw man. But, the analysis in this case is not as simple as Plaintiffs' proffered syllogism: "Viewpoint discrimination is unconstitutional and UC discriminates based on viewpoint, therefore UC's actions are unconstitutional." Accordingly, Plaintiffs' "resounding" success in tearing this straw man down rings hollow. (*See* Pls.' Reply 3 ("UC's silence is resounding on our 22 pages of facts and argument showing that UC policies ... discriminate by viewpoint and are content-based in regulation.").)

based upon, the content of speech. *See, e.g., United States v. Am. Library Ass'n*, 539 U.S. 194, 204-05 (2003); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (generalizing that governmental functions that require content-based **[13]**judgments, such as selecting programming for a public television station, are not subject to heightened scrutiny).

Instead, these regulations are constitutional if they are reasonably related to the government's goal of providing the public service and are not the product of government animus.[9] *See Am. Library*, 539 U.S. at 208 ("It is ***1096** entirely reasonable for public libraries ... to exclude certain categories of content...."); *Finley*, 524 U.S. at 587 ("The [government's] mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for [government] support sets it apart from the subsidy at issue in *Rosenberger* ...."); *Forbes*, 523 U.S. at 673-75 (cautioning against heightened scrutiny when the government necessarily makes content-based determinations).

In *Arkansas Education Television Commission v. Forbes*, the Supreme Court stressed that public television stations generally hold broad editorial discretion to select their content. 523 U.S. at 674 ("[T]he nature of editorial discretion counsels against

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[9] For reasons explained in Part II.B.I.a.ii., the government may not use otherwise lawful regulations to purposefully suppress a politically disfavored viewpoint. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

subjecting [public] broadcasters to claims of viewpoint discrimination.").[10] Public broadcasters are required to schedule programming that serves the "public interest, convenience, and necessity." *Id.* at 674 (citing 47 U.S.C. § 309(a)). In fulfilling this duty, a public broadcaster engages in speech activity by "facilitating the expression of some viewpoints instead of others." *Forbes*, 523 U.S. at 674. The Supreme Court identified additional situations in which a public entity's action necessarily facilitates the expression of some viewpoints to the exclusion of others. For example, "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, [and] a public school prescribing its curriculum...." *Id.*

[14]In these situations, heightened scrutiny "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* Scrutinizing a public station's discretionary decisions would be particularly problematic because "even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based." *Id.*

In *United States v. American Library Ass'n*, the Supreme Court recognized that public libraries "must have broad discretion to decide what material

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[10] The ultimate holding in *Forbes*-that a public television station may exclude from a televised debate candidates who lacked adequate public support, but may not exclude candidates with viewpoints disfavored by the station-rested on a narrow exception presented by candidate debates, which are "by design" fora for political speech of exceptional significance. 523 U.S at 675.

to provide to their patrons." 539 U.S. at 204 (holding that libraries may reasonably refuse to provide patrons with pornography). In exercising their broad discretion, public libraries necessarily make content-based judgments. *Id.* ("[L]ibraries collect only those materials deemed to have requisite and appropriate quality.").[11] Therefore, public libraries may exclude materials based upon content. *Id.* at 208 ("The librarian's responsibility ... is to separate out the gold from the garbage, not preserve everything.").

In *National Endowment for the Arts v. Finley*, the Supreme Court held that a government agency could make aesthetic judgments in allocating competitive funding for art projects that demonstrated "excellence." 524 U.S. at 586. After all, determinations of "excellence" are "inherently content-based." *Id.* Because*1097 limited funding was allocated according to a competitive process, the Supreme Court specifically noted that reliance on *Rosenberger* was "misplaced." *Id.*

The distribution of grants in *Finley* is the closest parallel to the UC admissions process. In both scenarios, the government is providing a public benefit that is allocated to a limited number of

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[11] Further, the Supreme Court permitted public libraries to regulate Internet content even though it did not review and affirmatively approve or disapprove of each website. *Am. Library*, 539 U.S. at 208 ("A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make.").

persons through a competitive process.[12] Like the government agency that must judge the excellence of prospective art projects, UC must judge the excellence of prospective students who apply for a guaranteed spot at UC.

[15]It is undisputed that the content of an applicant's high school courses is an important factor in evaluating the merit of that applicant.[13] According to defense expert Dr. Michael Kirst,[14] the content of high school courses is a "crucial variable in predicting whether students will succeed at very selective post-secondary institutions such as the University of California." (Kirst Decl. Ex. A, at 2.) Plaintiffs' experts concur that it is "educationally reasonable" for Defendants to condition admittance on content and skill requirements. For example, Dr. Donald Erickson,[15] one of Plaintiffs' education experts, finds it reasonable for UC to expect admitted students to know, among other things, about "plants," "evolution," "accurate carbon dating," and "the roles of Latinos in United States history." (Lynch Decl. No. 1 Ex. 57.)

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[12] Both parties agree that students admitted to UC receive benefits, such as discounted in-state tuition and education from an excellent academic institution. (Pls.' MSJ 3.)

[13] The parties' real dispute concerns the academic merit of Plaintiffs' courses.

[14] Dr. Kirst is "a longtime professor of education at Stanford University and an authority on college-preparatory curricula and standards." (Defs.' MSJ 10; *see also* Kirst Decl. Ex. A, at 1.)

[15] Dr. Erickson retired from teaching after 30 years as a professor, 11 of those years with the University of California, Los Angeles (Erickson Decl. Ex. 1.)

Dr. Derek Keenan,[16] another of Plaintiffs' education experts, testified that "critical thinking and analysis skills are legitimate concerns of [UC] in evaluating student preparation." (Lynch Decl. No. 1 Ex. 63.) According to Dr. Keenan, "it's educationally appropriate for [UC] to set standards for the content and skills that need to be mastered for students to attend" (Keenan Dep. 46-47), and "high school course content is an important factor in student preparation for college work" (Keenan Dep. 47).

Still, Plaintiffs argue that *Forbes*, *American Library*, and *Finley* "do not apply to [UC] admissions decisions and do not apply to [UC's] rejections of private school courses," yet provide no principled reason to depart from the reasoning of these cases.

First, Plaintiffs argue that *Ashcroft v. ACLU*, 542 U.S. 656 (2004), in which a speech regulation was declared unconstitutional, essentially overruled *American Library*. To the contrary, the *Ashcroft* opinion cites *American Library* with approval. *Id.* at 669. Although both the *Ashcroft* **[16]**and *American Library* regulations concerned Internet speech, that is the sole similarity. The differences are instructive. The statute in *Ashcroft* criminalized private speech made in a context in which there is no need for content-based judgments. *Id.* at 660 ***1098** ("Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be

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[16] Plaintiffs did not provide an expert report or biography from Dr. Keenan, who serves as the Vice President of Academic Affairs for ACSI. *Becoming a Life-Changing Leader*, ACSI.org, https:// www. acsi. org/ webfiles/ webitems/ attachments/ 002914_ Bio. doc.

a repressive force in the lives and thoughts of a free people."). On the other hand, the regulations in *American Library* did not prohibit or criminally punish speech; they merely limited the speech that a public library made available to the public in a manner consistent with its duty to funnel limited resources toward the most beneficial materials. 539 U.S. at 208. The A-G Guidelines and Policies also do not prohibit or criminally punish speech, and the need to evaluate the excellence of each UC applicant requires content-based judgments.

Next, Plaintiffs argue that *Finley* "involved government ... regulation of its own grant standards, not private speech." (Pls.' Opp'n 26 n. 8.) Yet, the regulations that Plaintiffs challenge impact private speech in precisely the same manner as *Finley*. One could just as easily frame the A-G Guidelines and Policies as "government regulation of its own college admissions standards, not private speech." Both here and in *Finley*, the government evaluates, but does not prohibit, private speech in an effort to award benefits based upon a competitive process.

Finally, Plaintiffs futilely attempt to distinguish *Forbes* by incorrectly characterizing the decision as one involving "a public school prescribing its curriculum." (Pls.' Opp'n 26 n. 10.) *Forbes* did not involve a public school; it involved a public television station. 523 U.S. at 674. In *Forbes*, the Supreme Court analogized a public television station's selection of its programming to a public school's selection of its curriculum, recognizing that both scenarios require the government to make content-based evaluations of private speech. *Id.* The

importance of *Forbes* is not its specific factual scenario, but its general principles related to content-based judgments and the problems inherent in scrutinizing those discretionary judgments.

Accordingly, the A-G Guidelines and Policies must be analyzed under *Finley*, while heeding the Supreme Court's warning in *Forbes* that judicial forays into the exercise of discretion are problematic. Heightened scrutiny is inappropriate here. If the A-G Guidelines and Policies are rationally related to the goal of selecting the most qualified students for admission, they do not **[17]**violate the First Amendment's guarantee of free speech. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study [is] one of 'the four essential freedoms' of a university.") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

i. *The A-G Guidelines and Policies Must Be Rationally Related to UC's Educational Goal of Admitting Qualified Students.*

It is undisputed that UC can reasonably reject courses that either (1) fail to teach important topics with sufficient accuracy and depth of coverage or (2) fail to teach relevant analytical skills. Now, the Court must consider whether the contested A-G Guidelines and Policies reasonably apply this standard, both substantively and procedurally. Because the test of reasonableness "is not capable of precise definition or mechanical application," its proper application "requires careful attention to the

facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Still, the rational basis test is extremely deferential to the government and the states. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic" of government regulation.***1099** *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."). Accordingly, government regulation is "accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). "[T]he burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

(a) *Are the A-G Guidelines and UC Position Statements Substantively Reasonable?*

Plaintiffs challenge the text of the A-G Guidelines and the following UC Position Statements:

(1) the UC Position Statement on Religion and Ethics Courses;

(2) the UC Position Statement on Science Courses; and

[18](3) the UC Position Statement on History and Social Science Courses.

(1) *UC Position Statement on Religion and Ethics Courses*

UC advises schools that, in order to receive A-G Subject credit, courses in religion or ethics should "treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint" and "should not include among its primary goals the personal religious growth of the student." (Pls.' Ex. 243.)

Defendants have offered expert testimony from Professor Sharf [17] defending this policy. Professor Sharf explains that the UC policy reflects the scholarly approach taken in the discipline of religious studies. "One of the methodological foundations of the [discipline] is the ability to step back and gain intellectual and emotional distance from the subject matter. (Sharf Decl. Ex. A, at 3.) By focusing on their own personal religious growth, students lack the "basic critical skill" required for academic study of religion-the ability to take a more observer-independent view. (Sharf Decl. Ex. A, at 13.) Professor Sharf finds the Position Statement on Religion and Ethics Courses to be reasonable because "scholarly detachment is requisite for the unbiased analysis into the nature of religious phenomena." (Sharf Decl. Ex. A, at 4.)

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[17] Professor Sharf is the Director of Religious Studies at the University of California, Berkeley. (Sharf Decl. Ex. A, at 3-4.)

Plaintiffs provide no evidence that the Position Statement on Religion and Ethic Courses is facially unreasonable, submitting only deposition testimony from Professor Daniel Guevara.[18] While Professor Guevara opines that several rejected religion courses are "excellent" or "amazing" (Guevara Dep. 88, 93), he never challenges Professor Sharf's support for the Position Statement. Instead, Professor Guevara only claims "I don't see that [a goal of religious growth] would spoil" a course for UC approval. (Guevara Dep. 124.) This conclusion with no factual basis does not meet Plaintiffs' burden to show a genuine issue as to whether they can negate "every **[19]**conceivable basis which might support" the Position Statement. *See Lehnhausen*, 410 U.S. at 364. Other evidence submitted by Plaintiffs recognizes that "it ***1100** is crucial that the distinction between religious studies and theology-between teaching and preaching-be maintained in higher and secondary education." (Pls.' Ex. 414, at 141.) "It is important to draw a sharp distinction ... between studying a religion as an academic enterprise and thinking about the divine on behalf of one's religious community." (Pls.' Ex. 414, at 141.)

Accordingly, there is no genuine issue of material fact as to this issue. The UC Position Statement on Religion and Ethics Courses is reasonable.

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[18] Plaintiffs did not provide an expert report or biography from Professor Guevara, who teaches philosophy at the University of California, Santa Cruz. *See UCSC Philosophy Department People*, UC Santa Cruz, http:// philosophy. ucsc. edu/ people.html.

(2) *UC Position Statements on Science and History Courses*

Plaintiffs base their claims against the UC Position Statements on Science and History Courses on the false assertion that these Position Statements require a secular curriculum without religious viewpoints. (Pls.' MSJ 11 ("In other words, there *must* be a 'secular history curriculum' without religious viewpoints."), 16 ("The [Science] Position Statement also means that *only* a 'secular science curriculum' (no religious viewpoint added) is approved.").) Yet, the Position Statements do not use the word "must"; rather, they use the word "can" (Pls.' Exs. 241-42), indicating that a "secular" curriculum is not mandatory for approval. Indeed, as discussed in Part II.A, Defendants have approved numerous science and history courses that incorporate religious viewpoints.

The rest of the Position Statements reinforce the purpose of the A-G Guidelines: Admitted students must attain "essential critical thinking and study skills," "the necessary preparation for courses, majors, and programs offered at [UC]," and "a body of knowledge that will provide breadth and perspective to new, more advanced studies." (Pls.' Exs. 241-42.)

There is no genuine issue of material fact as to this issue. The UC Position Statements on Science and History Courses are reasonable.

(b) *Are the Reviewers Qualified?*

Plaintiffs insinuate that the UC employees charged with reviewing high school courses are not sufficiently qualified to implement the A-G Guidelines and Policies. According to Plaintiffs, **[20]**"[course] review is by staff reviewers in the Office of the President, who with one exception have only college degrees and not more than a single college course in each subject.[19] UC's review is not by faculty members except in rare cases when they are sent a questioned course." (Pls.' MSJ 2.)

Defendants counter that each reviewer is provided with guidance for course review decisions, such as "subject matter descriptions, interpretive notes elaborating on these descriptions, [examples] of approved courses, competency standards and more." (Defs.' Opp'n 25 (citing Lynch Decl. No. 1 Ex. 2).) Further, UC reviewers can and do obtain additional guidance by consulting with other UC employees with specialized subject-area knowledge, including faculty. (Hargrove Decl. ¶¶ 3, 6 ("UC faculty members with PhDs review courses and textbooks about which staff reviewers have questions."); Lynch Decl. No. 2 Ex. 92.) In addition, Defendants contest Plaintiffs' allegation that course reviewers have limited educations, noting that "[s]ome of the UC staff reviewers also have post-bachelor's degrees, and most of the staff reviewers

[19] As support for this allegation, Plaintiffs cite only the deposition transcripts of two reviewers, Nina Costales and Jeanne Hargrove. Yet, Costales testified that she received about one year of graduate studies in education, and more than one class in English. (Costales Dep. 26-29.) Hargrove also testified that she took more than one class in history, English, and possibly government. (Hargrove Dep. 14-17).

have had more than *1101 one college course in the subjects reviewed." (Hargrove Decl. ¶ 6.)

There is no genuine issue of material fact here. The course reviewers are reasonably guided and qualified to make course approval determinations.

(c) *Is the UC Course Review Process Unreasonably "Probabilistic"?*

Plaintiffs complain that the UC course review process is "only 'probabilistic,' approving some poor courses where students do not learn and rejecting some good courses where students do learn." (Pls.' MSJ 2.) "Because UC reviews only course descriptions, it cannot know how a teacher will teach a course; a bad outline could be taught well, or a good outline could be taught poorly." (Pls.' MSJ 2.)

[21]UC admits the probabilistic nature of its course review process. (Defs.' Opp'n 6 ("Given the impracticability of observing all classes, the course review process is necessarily 'probabilistic' ...."); Tr. Hr'g 62 ("There's no certainty to [the course review process], ... but all of the experts agree that it's a reasonable way to do it.").)

Under the deferential rational basis standard "courts are compelled ... to accept [the government's] generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. The government may act if there is "a rational basis for doing so ..., even if it 'is probably not true' that those reasons are valid in the majority of cases." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000).

A regulation does not fail rational-basis review because it " 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

Here, there is no dispute that it is reasonable for UC to ensure that its admitted students took courses likely to have prepared them adequately for academic study. (Kirst Decl. Ex. A, at 1 ("Studies have found that the most important college preparation is the acquisition of sufficient content and critical thinking skills in high school courses."); Erickson Dep. 51-52 ("[UC has the right to determine] what content students should know before they come to UC."); Keenan Dep. 47 ("[C]ritical thinking and analysis skills are legitimate concerns of [UC] in evaluating student preparation.").) In addition, both parties agree it is better for UC to have more information about applicants than less, and that course descriptions give UC more information about course content than titles alone.

UC "relies upon an adequate syllabus (prepared by the teacher) as an indicator that the course will adequately prepare students, and a poor syllabus (again, prepared by the teacher) as an indicator to the contrary." (Defs.' Opp'n 6 (citing Lynch Decl. No. 2 Ex. 93).) Although this process is not certain, it is

reasonable. (*See* Kirst Decl. Ex. A, at 10 (concluding that the UC **[22]**course review process "is a reasonable and effective way to bridge the gap between high school and college").)

There is no genuine issue of material fact here. The UC course review process is not unreasonably probabilistic.

(d) *Is Reviewing Only California High School Courses Reasonable?*

Plaintiffs claim that the unreasonableness of the A-G Guidelines and Policies are evident in Defendants' failure to require out-of-state applicants to take UC-***1102** approved courses. (Pls.' MSJ 3.) To the contrary, it is reasonable for UC to limit its course review on California schools. Graduates of California high schools make up more than ninety percent of UC applicants. (Wilbur Decl. No. 1 ¶ 4.) "It would be unreasonably burdensome to expect UC to review courses from all schools in the United States." (Defs.' Opp'n 6.) Just because UC does not make individualized determinations where it would not be feasible to do so, does not discredit the determinations UC does make. *See Am. Library*, 539 U.S. at 208 (noting that a public library's inability to evaluate all Internet content does not diminish its discretion to evaluate other materials).

There is no genuine issue of material fact here. It is reasonable for UC to require approval for California high school courses, but not for out-of-state high schools.

Accordingly, the A-G Guidelines and Policies survive rational basis review.[20]

[23]ii. *Defendants Cannot Implement Regulations Because of Animus Toward Religion. Even If Those Regulations Are Rationally Related to UC's Educational Purpose.*

Even if the A-G Guidelines and Policies are rationally related to UC's educational purpose, Plaintiffs can still prevail if they demonstrate that the regulations are the result of government animus towards religious viewpoints. [21] In *Finley*, the Supreme Court repeatedly emphasized that the government may not punish disfavored viewpoints

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[20] Plaintiffs also argue that the course review process is unreasonable because UC "has no data showing [that added religious content] interfere[s]" with teaching required content. (Pls.' Reply 7.) Government action "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). As discussed in Part II.B.1.a.i.(a), the theoretical support for the UC course review process demonstrates its rationality. (*See also* Defs.' Opp'n 14 n. 20 ("It is reasonable for UC to set its admissions standards based on the considered judgment of its own faculty, even without quantitative evidence, and Plaintiffs cite no authority to the contrary.").) In addition, UC notes that empirical data "would not be feasible ..." (Defs.' Opp'n 13-14 n. 20.)

[21] This discriminatory intent analysis is not universally accepted, *Lukumi*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[The First Amendment] does not put us in the business of invalidating laws by reason of the evil motives of their authors."), but has garnered favor with a majority of the Supreme Court., *id.* at 500 (Kennedy, J.) ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.").

under the guise of legitimate regulations. 524 U.S. at 587 ("[T]he Government may not 'aim at the suppression of dangerous ideas'....") (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)); *id.* ("[A] more pressing constitutional question would arise if government [regulation was] calculated to drive 'certain ideas or viewpoints from the marketplace.' ") (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); *id.* ("If the [government] were to leverage its power to [regulate speech] into a penalty on disfavored viewpoints, then we would confront a different case.").

Although there is no guidance from the Ninth Circuit or the Supreme Court regarding government animus in the specific arena of free speech, two Supreme Court decisions have addressed the issue in the context of the Free Exercise Clause: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and ***1103** *Locke v. Davey*, 540 U.S. 712 (2004).

In *Lukumi*, the plaintiffs challenged a city ordinance that targeted the Santeria religion under the guise of a legitimate regulation on animal slaughter. 508 U.S. 520. Leaning on "the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," the Supreme Court invalidated the ordinance because it was not neutral and it was not a law of general applicability. *Id.* at 532.

[24]In *Locke*, the plaintiff challenged a state scholarship program that was available to all

qualifying college students except for those "pursuing a degree in theology." 540 U.S. at 716. Over Justice Scalia's vigorous dissent, the Supreme Court extended the *Lukumi* test to require an element of animus, even if the government regulation was not neutral. *Id.* at 724 ("Far from evincing the hostility toward religion which was manifest in *Lukumi,* [the scholarship program] goes a long way toward including religion in its benefits."); *see also id.* at 731 (Scalia, J., dissenting) ("The Court makes no serious attempt to defend the program's neutrality...."). Requiring strict scrutiny solely because a government regulation was not neutral "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* at 720.

Although decided under the Free Exercise Clause, *Lukumi* and *Locke* guide this Court's analysis of Plaintiffs' claim under the Free Speech Clause. [22] The animus requirement is equally applicable whether the government is punishing disfavored viewpoints or disfavored religious practices. In this case, importing the test used in free exercise cases is particularly appropriate because Plaintiffs complain of discrimination against religious speech.[23] *Cf. Capitol Square Review &*

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[22] Plaintiffs themselves contend that *Lukumi* is the proper framework for determining whether the purpose of a law is to restrict practices because of their religious motivation. (Pls.' Opp'n 17 (comparing UC to the city council in *Lukumi*).)

[23] Indeed, government regulation of religious speech has been challenged under the Free Exercise Clause. *See, e.g., Am. Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114 (9th Cir.2002).

Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (observing that "private religious expression receives preferential treatment under the Free Exercise Clause"); *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating restrictions on religious speech under both the Free Speech and Free Exercise Clauses).

Here, the A-G Guidelines and Policies are more like the scholarship program in *Locke* than the criminal prohibition in *Lukumi*. In *Locke*, the Supreme Court noted that the challenged scholarship program was distinguishable from the invalidated criminal statute in *Lukumi* in three fundamental ways. First, the scholarship program imposed a "far milder" burden on religion. 540 U.S. at 720. Second, the scholarship program went "a long way" to include religion. *Id.* at 724. **[25]**Finally, the history of the ordinance did not reveal animus toward religion. *Id.* at 725. The Supreme Court upheld the scholarship program even though it expressly discriminated against theology majors.

The A-G Guidelines and Policies share the same critical distinctions found in *Locke*. First, any burden on religious schools or their students is mild, particularly when compared to the heavy criminal ***1104** penalties at stake in *Lukumi*. UC does not penalize students for taking non-approved courses or attending schools that teach non-approved courses. Should a student attend a religious school that does not offer approved courses in the A-G Subjects, that student may demonstrate proficiency in a number of alternative ways.

Second, UC "goes a long way" to accommodate religious school students. Defendants offer students alternative ways of demonstrating proficiency in the A-G Subjects (*see* Part I.A) and offer religious schools personalized assistance in creating curriculums that would earn approval. (Pls.' Ex. 240 (UC Position Statement) ("[UC] is happy to provide additional assistance to high schools, including Christian schools, through a collaborative consultation process, in order to help the schools create course outlines that meet the faculty's 'a-g' course requirements.").)

Finally, there is little in the history of the A-G Guidelines and Policies to demonstrate that Defendants were motivated by an improper purpose. Plaintiffs' best evidence of animus is their characterization of the deposition testimony from the former chair of the UC board responsible for the A-G Guidelines and Policies, Michael Brown, that the "subtext" of Defendants' discussion in adopting the UC Position Statement on science was "antagonism toward the Christian schools," and that religious schools' "right wing perspectives were highly objectionable." [24]

Brown's actual deposition testimony was as follows:

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[24] At oral argument, Plaintiffs conceded that "[w]e do not intend to argue the case based on proving animus." (Tr. Hr'g 39; *see also* Tr. Hr'g 40 ("[W]e have cited in our brief the primary evidence that would support a finding of animus. We are not doing so to argue animus.").)

Q: Did the emotional tenor of any others on the BOARS committee in your view reflect antagonism toward the Christian schools or what they taught?

[26]A: It was my assessment that that was the subtext. It wasn't that anybody ever said they're Christian schools, we ain't approving them, but I had the sense that their feelings about radical or fundamentalist ... right wing perspectives were highly objectionable.

(Brown Dep. 143-44.)

Even construing this evidence in the light most favorable to Plaintiffs, Brown's testimony is insufficient to create a genuine issue of material fact. Brown's "assessment" and "sense" that the committee was antagonistic is of little value without concrete factual support. In addition, the power of Plaintiffs' quotation is tempered by their omission of the words "radical" and "fundamentalist." These adjectives suggest the Board's "feelings" concerned extreme views inconsistent with knowledge generally accepted in the relevant academic community rather than antagonism toward religion. Further, Brown admitted in his deposition that his "assessment" did not apply to the entire board. (Brown Dep. 144 ("Most [board members] were quiet.... Trying to, in my view, reason it out.... I was actually honored by that. I really appreciated being in that context to see [board members] trying to grapple with it.").) An email Brown sent to the board after the allegedly antagonistic discussion confirms his appreciation: "I remain deeply appreciative of the tenor of [the] discussion ... regarding the issue of

approving science courses ... submitted from 'Christian' schools.... I thought the [board members] participated in a frank, thoughtful, and sensitive manner." (Pls.' Ex. 157.)

***1105** These facts stand in stark contrast to those in *Lukumi*, where the animus was "manifest." See *Locke*, 540 U.S. at 724. There, "the record ... compel[ed] the conclusion that suppression of the central element of the Santeria worship service was the object of the [city] ordinance." 508 U.S. at 534. First, the penalties were stiff. Violators of the ordinance could be imprisoned for up to sixty days and fined up to $500. *Id.* at 528. Second, the ordinances were aimed at "one of the principal forms of devotion" in the Santeria worship, animal sacrifice. *Id.* at 524. Finally, "[t]he burden of the ordinance, in practical terms, [fell] on Santeria adherents but almost no others." *Lukumi*, 508 U.S. at 536. The city had made no attempt to address the issue of animal killing until after a Santeria church announced its plans to open within the city. *Id.* at 541. Taped excerpts of **[27]**a city meeting at which the issue was addressed "evidence[d] significant hostility [from] residents, members of the city council, and other city officials toward the Santeria religion." *Id.*

A few examples of the comments in *Lukumi* provide a sharp distinction from Brown's "sense" of antagonism: Crowd members cheered statements made by council members that were critical of Santeria and taunted members of the Santeria church. *Id.* One councilman said that Santeria devotees "are in violation of everything this country

stands for" and another asked "[w]hat can we do to prevent the Church from opening?" *Id.* A city official told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons" and urged the city council "not to permit this Church to exist." *Id.* at 541-42. Also, the city attorney commented that the ordinance indicated that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

Given the Supreme Court's caution against extending *Lukumi* too far beyond its facts, *Locke*, 540 U.S. at 720, there is no genuine issue of material fact as to this issue. Defendants were not motivated by animus in setting the A-G Guidelines and Policies.

b. *Overbreadth*

Plaintiffs argue that the UC course review process is facially overbroad under the Free Speech Clause. The overbreadth doctrine is an "exception from general standing rules" that allows a plaintiff to seek facial invalidation of a law that "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected," even if that law is constitutional as applied to the plaintiff. *Forsyth County*, 505 U.S. at 129-30. This doctrine recognizes that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Id.* at 129.

To succeed on their overbreadth claim,[25] Plaintiffs must show that the A-G Guidelines and Policies "punish a 'substantial' amount of protected free speech, 'judged in relation to the statute's [28]plainly legitimate sweep.' " *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

For support, Plaintiffs rely heavily on the erroneous assumption that Defendants*1106 have a policy of rejecting all courses that add a religious viewpoint. Indeed, that policy (if it existed) would likely cause Defendants to incorrectly reject a large number of courses that meet UC's academic standards.[26] However, the face of the A-G Guidelines and Policies consistently stress that courses must prepare students for college, a legitimate goal of the state. Plaintiffs have provided little evidence that any course (let alone a substantial number) technically falls under the text of the A-G Guidelines and Policies, but nevertheless prepares students for college. Rather, Plaintiffs' evidence, at best, alleges that Defendants incorrectly apply the A-G Guidelines and Policies to Plaintiffs' courses because those courses do teach students the knowledge and skills necessary for college.[27]

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[25] Plaintiffs ignore their overbreadth claim in their Motion, but address it in response to Defendants' Motion.

[26] Because this policy does not exist (*see* Part II.A), the Court will not determine whether the amount of speech that would have been rejected under Plaintiffs' hypothetical policy is "substantial" enough to warrant facial invalidation.

[27] Also persuasive is that high schools are not additionally punished for submitting a rejected course. Unlike speakers who may not be willing to test the constitutionality of a law that

There is no genuine issue of material fact as to this issue. The A-G Guidelines and Policies are not overbroad.

c. *Unbridled Discretion*

Plaintiffs argue that the UC course review process is facially unconstitutional under the Free Speech Clause because the course reviewers exercise "unbridled discretion" to grant or deny course approval. (Pls.' MSJ 26 ("The long-settled rule is that 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint' on freedom of expression.") (quoting *Lakewood*, 486 U.S. at 757).) Defendants argue that an "unbridled discretion" challenge is only available in the context of a licensing statute or other prior restraint and therefore does not apply to the A-G Guidelines and Policies. (Defs.' Opp'n 24-25.)

[29]i. *Plaintiffs Cannot Challenge the A-G Guidelines and Policies Under the "Unbridled Discretion" Doctrine.*

The Supreme Court has expressly noted that whether regulations other than licensing schemes are subject to the "unbridled discretion" analysis is an open question. *Ward*, 491 U.S. at 794 ("Since [the plaintiff] does not claim that city officials enjoy unguided discretion to deny the right to speak

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could put them in jail-one of the reasons the overbreadth doctrine exists-high schools are in the same position after a course is rejected as before. All that is lost is the time the school employees spent putting together the course description.

altogether, it is open to question whether [the plaintiff's] claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority."). In *Ward*, the Supreme Court side-stepped this threshold question, finding that even if the plaintiff could bring an unbridled discretion challenge, it would fail. *Id.*

Still, the majority in *Ward* strongly suggested that regulations other than prior restraints should not be subject to the "extraordinary doctrine" that permits facial challenges on the grounds of overly broad discretion. *Id.* at 793-94. "[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.' " *Id.* at 795 n. 5 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

Noting that the city regulation at issue "is of an entirely different, and less, order of magnitude" than regulations that could *1107 deny a speaker the ability to speak, the Supreme Court observed that its prior cases permitting an unbridled discretion challenge "have generally involved licensing schemes that Ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity.' " *Id.* at 793-94 (quoting *Lakewood*, 486 U.S. at 755). "The relevant question is whether the challenged regulation authorizes suppression of speech in advance of its expression, and the [challenged regulation] does not." *Id.* at 795 n. 5.

Likewise, the A-G Guidelines and Policies do not forbid expressive activity. Religious schools may teach any course and their students may take any course without penalty.

Plaintiffs cite *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), for the proposition that "unbridled discretion" may invalidate regulations other than licensing. Plaintiffs assert that the "Supreme Court says the unchecked discretion over speech *is* the prior restraint...." (Pls.' Reply **[30]**10.) For support, Plaintiffs rely on dicta [28] from *Broadrick* that unbridled discretion challenges are permitted where "[expressive or communicative] conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." 413 U.S. at 613.

Plaintiffs' argument is misplaced. *Broadrick* singles out expressive activity that "required official approval." *Id.* It follows, then, that *Broadrick* contemplates situations in which the government holds the power to prevent the speech before it even begins. Such a restriction meets the very definition

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[28] The Court emphasizes that Plaintiffs' quote is irrelevant to the Supreme Court's decision in *Broadrick*. The *Broadrick* plaintiffs did not challenge the statute under the unbridled discretion doctrine. Nor did the Supreme Court perform an unbridled discretion analysis. Rather, the Supreme Court identified the unbridled discretion doctrine as one of the "limited exceptions" to the general standing requirement, which usually allows plaintiffs to challenge only regulations that are unconstitutional as applied to them. *Broadrick*, 413 U.S. at 610.

of a prior restraint. This conclusion is supported by the *Broadrick* passage from which Plaintiffs selectively quote; it discusses prior restraints. The statute at issue in *Broadrick* was a prior restraint that prohibited state employees from engaging in certain political speech. *Id.* at 602. Moreover, the four cases the Supreme Court cites in support of Plaintiffs' selective quotation from the *Broadrick* opinion all involved licensing statutes. *Id.* at 613 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (invalidating a statute that criminalized publicly demonstrating without a permit), *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing a criminal conviction for obstructing traffic when publicly demonstrating without prior approval from city officials), *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating a statute that criminalized holding a religious meeting without a permit), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (invalidating a statute that criminalized distributing pamphlets without a permit)).

The correct interpretation of Plaintiffs' *Broadrick* quote is not that standardless discretionary power creates a prior restraint, but that standardless discretionary power makes existing prior restraints "virtually unreviewable."

Accordingly, Plaintiffs cannot challenge the A-G Guidelines and Policies under the ***1108** "extraordinary doctrine" that prohibits unbridled discretion.

[31]ii. *Even If Permitted, Plaintiffs' "Unbridled Discretion" Challenge Would Fail.*

Laws invalidated under the "unbridled discretion" doctrine gave city officials "unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit that was issue [d]." *Lakewood*, 486 U.S. at 755 ("It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion."). Likewise, in *Saia v. New York*, there were "no standards" to guide the police chiefs discretion. 334 U.S. 558, 560 (1948).

In contrast, UC course reviewers are given "subject matter descriptions, interpretive notes elaborating on these descriptions, [examples] of approved courses, competency standards and more." (Defs.' Opp'n 25 (citing Lynch Decl. No. 1 Ex. 2).) Further, UC reviewers can obtain additional guidance by consulting with other UC employees with specialized subject-area knowledge, including faculty. (Rashid Decl. No. 1 ¶ 6; Hargrove Decl. ¶ 3; Lynch Decl. No. 2 Ex. 92.)

There is no genuine issue of material fact as to this issue. Defendants have sufficient guidance to defeat a challenge of unbridled discretion.

Defendants are entitled to summary judgment on Plaintiffs' unbridled discretion claim.

2. *Free Exercise and Establishment Clauses*

Plaintiffs allege that the A-G Guidelines and Policies: (1) exhibit hostility toward religious schools, in violation of the Free Exercise Clause and

Establishment Clause; and (2) prescribe what shall be orthodox in religion, in violation of the Free Exercise Clause.

a. *Hostility Toward Religious Schools*

Plaintiffs allege that the A-G Guidelines and Policies are "hostile" towards religious schools on their face.[29] Again, the parties disagree on which test governs Defendants' alleged conduct. Plaintiffs provide no test at all in their opening brief, stating only that "hostility towards religion" is **[32]**forbidden. (Pls.' MSJ 24 (citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).) Plaintiffs' Complaint contends that "hostility to religion" violates the Establishment Clause. Defendants argue in their Opposition that "claims of hostility should be evaluated under the Free Exercise Clause, not the Establishment Clause." (Defs.' Opp'n 28 (citing Lukumi, 508 U.S. at 532).)

In the Ninth Circuit, both the Establishment Clause and Free Exercise Clause govern claims of hostility to religion, depending on the nature of the hostility. Claims of hostility in the form of symbolic disapproval of religion are evaluated under the Establishment Clause. *See Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir.2002). [30] Claims of hostility in the ***1109**

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[29] Plaintiffs also include a laundry list of allegedly hostile actions that are not covered by their facial claims. These allegations are addressed in Part II.C.2.

[30] In *American Family*, the Ninth Circuit determined that a hostility claim under the Free Exercise Clause could only survive if the plaintiff alleged "specific religious conduct that

form of laws that burden a plaintiff's ability to practice his religion are evaluated under the Free Exercise Clause. *Lukumi*, 508 U.S. at 532; *see also Locke*, 540 U.S. 712.

Here, the A-G Guidelines and Policies could fall under either clause, depending on how the evidence is viewed. In the light most favorable to Defendants, the course-review process at worst symbolically disapproves of the academic value of Plaintiffs' beliefs. In the light most favorable to Plaintiffs, the course-review process burdens students who must take additional tests to demonstrate proficiency in the A-G Subjects.

i. *Symbolic Hostility Under the Establishment Clause*

Although Establishment Clause claims typically challenge government action that allegedly benefits religion, the clause also governs "a claim brought under a hostility to religion theory." *Am. Family*, 277 F.3d at 1121; *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir.1994) ("The government neutrality required under the Establishment Clause is ... violated as much by government disapproval of religion as it is by government approval of religion.").

"Notwithstanding its 'checkered career,' *Lemon v. Kurtzman*, 403 U.S. 602 (1971), continues to set

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was affected by the [government's] actions." 277 F.3d at 1124. Because symbolic disapproval does not, by definition, burden religious conduct, any Free Exercise Claim based on symbolic disapproval fails. *Id.* ("[A]lleging a subjective chilling effect on free exercise rights is not sufficient to constitute a substantial burden.").

forth the applicable constitutional standard for assessing governmental actions **[33]**challenged under the Establishment Clause." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1254 (9th Cir.2007) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)). Under *Lemon*, government action does not violate the Establishment Clause if it: (1) has a secular purpose, (2) has a primarily secular effect; and (3) does not excessively entangle the government with religion. 403 U.S. at 612-13.

(a) *Secular Purpose*

Government action "will stumble on the purpose prong 'only if it is motivated wholly by [the] impermissible purpose' " of endorsing or disapproving religion. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (1993) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)). The Court must focus "solely on purpose" and cannot "question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions...." *Am. Family*, 277 F.3d at 1121. In addition, the court "must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner*, 1 F.3d at 782 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)).

Here, a secular purpose is plainly evident. UC aims to admit the most qualified students and ensure that those students have the knowledge and skills necessary to succeed at UC.

(b) *Secular Effect*

Under the effect prong of the *Lemon* test, the Court must determine whether, from the perspective of an informed and reasonable observer, the government's action has "the principal or primary effect of advancing or inhibiting religion." *Am. Family*, 277 F.3d at 1122.

Here, a reasonable person would not find the primary effect of the UC course review process to be inhibition of religion. UC approves many courses that include religious perspectives or are submitted by *1110 religious schools. Additionally, an informed observer would be aware of the controversial nature of intelligent design and creation as scientific beliefs. *See Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707, 764 (E.D.Pa.2005); *McLean v. Ark. Bd. of Educ.*, 529 F.Supp. 1255, 1259 (E.D.Ark.1982) (dismissing "creation science" as "simply not a science"). No reasonable and informed observer could conclude that refusing to recognize intelligent design as science or other religious beliefs as academics has the primary effect of inhibiting religion.

[34]Therefore, Defendants meet the secular effect prong of the *Lemon* test.

(c) *Excessive Entanglement*

Plaintiffs contend that government evaluations of religious content excessively entangle the government with religion. (Pls.' MSJ 26.) This argument is undermined by two Supreme Court

cases in which public schools argued that they must exclude religious speech because allowing the speech would result in excessive entanglement. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (invalidating a public high school policy excluding religious after school clubs); *Widmar*, 454 U.S. 263 (invalidating a state university policy prohibiting the use of buildings or grounds for religious worship). In both cases, the Supreme Court recognized that excluding religious speech posed a *greater* risk of "entanglement" because the public schools would have to determine what words and activities fell within the prohibited categories of religious worship and religious teaching. *Widmar*, 454 U.S. at 272 n. 11; *see also Mergens*, 496 U.S. at 253 ("[D]enial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech....").

While "invasive monitoring" designed to root out religious speech may constitute impermissible entanglement, application of the A-G Guidelines and Policies to private schools does not implicate this potentially unconstitutional consequence. First, these regulations do not require Defendants to identify religious speech. Rather, Defendants are charged with determining what content and skills are necessary for college preparation, and whether high school courses adequately teach the necessary content and skills.

Second, there is no invasive monitoring. *See Widmar*, 454 U.S. at 272 n. 11 ("There would also be a continuing need to monitor group meetings to ensure compliance with the rule."). Religious schools

seeking course approval need only submit a course description to UC. Defendants do not monitor classroom instruction to ensure that students are taught the approved content. The A-G Guidelines and Policies do not excessively entangle the government with religion.

There is no genuine issue of material fact here. Defendants are entitled to judgment as a matter of law on Plaintiffs' facial Establishment Clause claim.

[35]ii. *Burdensome Hostility Under the Free Exercise Clause*

Plaintiffs also argue that the UC course review process violates the Free Exercise Clause because UC imposes a substantial burden on religious school students' right to practice their religion. The analysis under the Free Exercise Clause has changed drastically over the past twenty years. Formerly, *Sherbert v. Verner*, 374 U.S. 398 (1963), governed Free Exercise claims. Under *Sherbert*, any government conduct or regulation that substantially burdened a religious practice was unconstitutional unless it was narrowly tailored to achieve a compelling state interest. 374 U.S. at 402-03. The ***1111** government's burden was high. *Id.* at 407. ("[I]n this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' ") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

In 1990, the Supreme Court radically changed course, effectively overruling *Sherbert* in *Department*

of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Under *Smith*, if prohibiting the exercise of religion is not the object of the law, but merely the incidental effect of a generally applicable law, then there is no Free Exercise violation.[31] *Id.* at 884 ("To make an individual's obligation to obey [otherwise valid laws of general application] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' ... contradicts both constitutional tradition and common sense."). The *Smith* Court held that the Free Exercise Clause does not require a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* at 883-90.

In *Lukumi*, the Supreme Court clarified its holding in *Smith*, observing that a free exercise violation would exist if the plaintiff showed that the challenged law is either not neutral or not generally applicable. 508 U.S. at 531-34. Finally, in *Locke*, the Supreme Court went a step further. Under *Locke*, the law must be the product of animosity toward religion. 540 U.S. at 724.

[36]Because Plaintiffs' free exercise claim is subject to the same test as their free speech claim-the regulations must be rationally related to a

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[31] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which required strict scrutiny for laws that "substantially burdened" a person's ability to practice their religious beliefs. *See* 42 U.S.C. § 2000bb-1. Finding that Congress had exceeded its power, the Supreme Court declared RFRA to be unconstitutional when applied to state and local regulations. *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

legitimate state interest and not motivated by animus-the results are identical as well. As discussed in Part II.B.1.a.ii, the A-G Guidelines and Policies are closer to the civil regulation in *Locke* than the criminal prohibition in *Lukumi* because of the relatively mild burden placed on religious schools and their students, Defendants' attempts to accommodate religion, and the lack of evidence concerning animus.

Accordingly, there is no genuine issue of material fact as to animus or the reasonableness of the A-G Guidelines and Policies under the Free Exercise Clause.

b. *Prescription of Orthodoxy*

Plaintiffs selectively quote Supreme Court precedent as the basis for a cause of action in bringing their claim that the A-G Guidelines and Policies "prescribe what shall be orthodox in ... religion." (Pls.' MSJ 23 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).) In *American Family*, the plaintiff brought a claim against the government for "prescrib[ing] an orthodoxy of belief on the subject of homosexuality." 277 F.3d at 1124. The Ninth Circuit noted that the "dozens of cases" supporting the "principle that the government cannot prescribe matters of opinion or belief" involved compelled speech. *Id.* As discussed above, the A-G Guidelines and Policies do not compel or prohibit speech. Religious schools are free to teach any belief system they choose.

There is no genuine issue of material fact here. Defendants are entitled to summary*1112 judgment on Plaintiffs' "prescription" claim.

3. *Equal Protection Clause*

As an alternative basis for relief, Plaintiffs argue that the A-G Guidelines and Policies violate the Equal Protection Clause by discriminating against religious schools.[32] (Pls.' Reply 10.) As to claims of religious discrimination, if the defendant's actions do not violate the Free Exercise [37]Clause, then courts will apply only rational basis scrutiny to equal protection claims based on religion. *Locke*, 540 U.S. at 720 n. 3 ("Because we hold that the program is not a violation of the Free Exercise Clause, ... we apply rational basis scrutiny to [the plaintiffs] equal protection claims."); *see also Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974) (applying "the traditional rational-basis test" to an equal protection claim premised on religious discrimination that did not violate the Free Exercise Clause).

As discussed in Part II.B.1.a.i, there is no genuine issue of material fact as to whether the UC

[32] Plaintiffs analogize their claims to those in *Regents v. Bakke*, 438 U.S. 265 (1978), where "it violated equal protection to render Caucasian males ineligible for 16 of 100 seats in the entering class." (Pls.' MSJ 29.) As discussed in footnote three, Plaintiffs' assertion that the A-G Guidelines and Policies "render Christian school students ineligible for ninety-eight percent of the seats in the [UC] entering class" is mistaken. (Pls.' MSJ 29.)

course review process satisfies rational basis scrutiny.[33]

C. *Plaintiffs' "As Applied" Constitutional Claims*

Plaintiffs also challenge Defendants' application of the A-G Guidelines and Policies to specific courses for which Plaintiffs sought approval and were rejected under the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses.

1. *Free Speech Clause*

Plaintiffs challenge Defendants' application of the A-G Guidelines under the Free Speech Clause, arguing that Defendants' rejections of Plaintiffs' courses were unconstitutional viewpoint discrimination and content regulation.[34]

As discussed in Part II.B.1, Defendants necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC. Therefore, unless a decision to deny course approval was unreasonable in light of UC's goal to

[33] Plaintiffs also claim that Defendants violate the Equal Protection Clause by requiring course approval for graduates of California high schools, but not for graduates of out-of-state high schools. (Pls.' Reply 10.) Because California high school students are not a suspect class, this practice is subject to rational review. As discussed in Part II.B.1.a.i.(f), Defendants' decision not to evaluate out-of-state high school courses is reasonable.

[34] The overbreadth and unbridled discretion doctrines only apply to facial challenges.

admit the most qualified students or was the product of animus, that decision is constitutional.

Plaintiffs' "as applied" claims concern rejected courses that fall into four subjects: (1) biology; (2) history and government; (3) English; and (4) religion. (*See* Watters Decl. Apps. A-C.) Plaintiffs do not provide an analysis as to why any of the more than 150 courses rejected **[38]**by UC should have been approved. Rather, Plaintiffs only claim that the courses were unconstitutionally rejected pursuant to UC's unconstitutional policies, such as the "Single Religious Viewpoint Policy."

However, the Court earlier found that these policies did not exist. Therefore, Plaintiffs have not supplied any basis for their summary judgment request on the ***1113** as-applied challenges to the rejection of specific courses. The Court is not obligated to consider matters not specifically brought to its attention. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir.2001) ("A district court is 'not required to comb the record [when ruling on] a motion for summary judgment.' "). Still, the Court will determine whether Defendants supply a rational basis for their rejection of Plaintiffs' courses.

Because only Plaintiffs seek summary judgment on their "as applied" claims, the Court reviews the evidence in the light most favorable to Defendants to determine if a genuine issue of material fact exists.

a. *Plaintiffs' Rejected Biology Courses*

Plaintiffs challenge Defendants' decision to reject biology courses that used *Biology: God's Living Creation* (published by A Beka) or *Biology for Christian Schools* (published by Bob Jones University ("BJU")) as the primary text. (Defs.' Opp'n 8.) Around early 2003, UC Professor Barbara Sawrey reviewed these two Christian biology textbooks [35] and concluded that they were inappropriate for use as primary texts in college-preparatory science classes. (Sawrey Decl. ¶ 3.) Professor Sawrey found these texts problematic because they characterized religious doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical thinking, and took an "overall un-scientific approach to the subject matter." (Defs.' Opp'n 9; Sawrey Decl. ¶ 3.) [36]

[39]Sawrey's "judgment was based not on the fact that the textbooks contained religious references and viewpoints, but on [her] conclusion that [the

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[35] Professor Sawrey also reviewed a Christian chemistry textbook published by BJU. (Sawrey Decl. ¶ 3.) She concluded this chemistry text could adequately serve as the primary text for UC-approved courses. (Sawrey Decl. ¶ 3.)

[36] The UC Position Statement on Science Courses reflects these concerns:

> The texts in question are primarily religious texts; science is secondary.... Courses that utilize these texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary. Students who [are] **[39]**taught to discount the scientific process and the scientific conclusions validated by a wealth of scientific research are not being provided with an understanding of scientific principles expected by the UC faculty.

(Wilbur Decl. No. 2 Ex. 2.)

texts] would not adequately teach students the scientific principles, methods, and knowledge necessary for them to successfully study those subjects at UC." (Sawrey Decl. ¶ .) [37] After forming her conclusions, Professor Sawrey shared her findings with other members of the course review committee, who supported her conclusions. (Sawrey Decl. ¶ 4.)

Defendants' biology experts, Professors Donald Kennedy [38] and Francisco Ayala,[39] *1114 concur in her judgment. Professor Kennedy determined that "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible ... both texts fail to encourage critical thinking and the skills required for careful scientific analysis." (Kennedy Decl. Ex. A, at 8.) Professor Ayala found that the texts "reject the methodology generally accepted in science, which

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[37] Similarly, some Christian schools have declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit. (Lynch Decl. No. 1 Exs. 47B ("[Valley Christian School] felt that the A Beka books ... did not represent the same level of academic rigor as we could find in some other texts."), 47C ("[Patten Academy declined to use A Beka and BJU textbooks] because they didn't provide the content that the principal and faculty believed would prepare the youngsters to meet their post-high school goals."); *cf.* Lynch Decl. No. 1 Ex. 47A ("[Oaks Christian School] acknowledge[s] that there was a much fuller treatment of evolution in the secular book that [it] used [than the BJU biology textbook, which it did not use].").)

[38] Professor Kennedy, the editor-in-chief of *Science* magazine, teaches biology at Stanford University, where he once served as President of the University. (Kennedy Decl. Ex. A, at 4-5.)

[39] Professor Ayala teaches biological sciences at University of California, Irvine. (Ayala Decl. Ex. A, at 4.)

relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." (Ayala Decl. Ex. A, at 4.)

Both professors concluded that neither of the two Christian textbooks are appropriate for use as the principal text in a college preparatory biology course. (Ayala Decl. Ex. A, at 28; **[40]**Kennedy Decl. Ex. A, at 20.) In making this finding, Professor Kennedy reiterated Professor Sawrey's initial conclusion that "the problem is not ... that the creationist view is taught as an alternative to scientific explanations, but that the nature of science, the theory of evolution, and critical thinking are not taught adequately." (Kennedy Decl. Ex. A, at 7.)

Plaintiffs' evidence also supports Defendants' conclusion that these biology texts are inappropriate for use as the primary or sole text. Plaintiffs' own biology expert, Professor Michael Behe,[40] testified that "it is personally abusive and pedagogically damaging to de facto require students to subscribe to an idea.... Requiring a student to, effectively, consent to an idea violates [her] personal integrity. Such a wrenching violation [may cause] a terrible educational outcome." (Behe Decl. ¶ 59.)

Yet, the two Christian biology texts at issue commit this "wrenching violation." For example, Biology for Christian Schools declares on the very first page that:

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[40] Professor Behe teaches biological sciences at Lehigh University. (Behe Decl. 47.)

(1) " 'Whatever the Bible says is so; whatever man says may or may not be so,' is the only [position] a Christian can take...."

(2) "If [scientific] conclusions contradict the Word of God, the conclusions are wrong, no matter how many scientific facts may appear to back them."

(3) "Christians must disregard [scientific hypotheses or theories] that contradict the Bible."

(Phillips Decl. Ex. B, at xi.)

Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' biology courses was reasonable.

b. *Plaintiffs' Rejected History and Government Courses*

Plaintiffs challenge Defendants' decision to deny history and government courses that used primary texts published by BJU or A Beka. Professor James Given, while on the UC course review committee, reviewed the United States history textbook published by BJU and concluded that the text failed to adequately teach critical thinking and modern historical analytic methods. Professor Given reached this conclusion because the text:

[41]instructs that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their

contributions based on their religious motivations or lack thereof and contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups.

(Given Decl. ¶ 8.)

Defendants' history expert, Professor Gary Nash,[41] concurred with Professor *1115 Givens' evaluation, finding that the text should not be used as the primary text for a college-preparatory history course. (Nash Decl. Ex. A, at 6.) Specifically, Nash found that the text failed to encourage "historical thinking skills and analytical thinking" and failed to cover "major topics, themes, and components of United States history." (Nash Decl. Ex. A, at 6.) "From reading the [reviewed text], students will have little opportunity to exercise independent judgment, to sharpen their critical thinking skills, or to consider multiple perspectives of those who made our history." (Nash Decl. Ex. A, at 9.) These students "will have difficulty understanding history as a discipline as it has been practiced since Herodotus and Thucydides-a never-ending quest to reconstruct the past based on new evidence and informed by new questions posed about the functioning of past societies." (Nash Decl. Ex. A, at 9.)

Defendants' government expert, Professor Mark Petracca, evaluated a government text published by BJU that each of the rejected government courses

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[41] Professor Nash has taught history at the University of California, Los Angeles for "nearly forty years." (Nash Decl. Ex. A, at 3.)

relied on as the primary or sole text, finding that "[u]se of this [text] as the principal text in a United States government course will not provide adequate preparation for study at UC." (Petracca Decl. Ex. A, at 2.) Professor Petracca found that the BJU government text does not acknowledge the commonly-accepted framework for scholarly analysis and provides little opportunity for critical thinking. (Petracca Decl. Ex. A, at 2.) In addition, the text contains "many factual and empirical assertions that are not generally accepted among political scientists [or] historians and that are nevertheless not substantiated within the text by evidence." (Petracca Decl. Ex. A, at 3.)

[42]Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' history and government courses was reasonable.

c. *Plaintiffs' Rejected English Course*

Plaintiffs challenge Defendants' decision to deny one English course that used a primary text published by A Beka. First, the A Beka text (*Classics for Christians*) is an "anthology of excerpts," which UC will not approve, no matter the content of the excerpts. "College-preparatory courses are expected to require students to read full-length works." (Defs.' Opp'n 12; Lynch Decl. No. 1 Ex. 2, at 5.) Plaintiffs' English expert, Dr. Sandra Stotsky,[42] agreed that a

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[42] Dr. Stotsky is an independent researcher and consultant in education. She received her doctorate in reading research and reading education from the Harvard Graduate School of

general rule against anthologies of excerpts is reasonable. (Lynch Decl. No. 2 Ex. 104.) Second, Jeanne Hargrove, a UC course reviewer, found the A Beka text inappropriate as a primary text in English because its "selection of works and pedagogical apparatus were inconsistent with ... expectations regarding critical thinking and broad exposure to writers' key works." (Hargrove Decl. ¶ 5.)

Defendants' English expert, Professor Samuel Otter,[43] concurs, finding that the A Beka text is inadequate for a college-preparatory English class because it "fails to provide substantial readings and because it insists on specific interpretations [of those readings]." (Otter Decl. Ex. A, at 4.) These deficiencies rendered the text inadequate to provide "analytical and critical skills." (Otter Decl. Ex. A, at 4.) Further, Otter explains that the text fails to meet ***1116** UC standards "not because it offers a 'Christian and civic' perspective on its materials but because it fails to provide substantial readings and because it insists on specific interpretations." (Otter Decl. Ex. A, at 4.) "Such a combination contradicts the emphasis on analytical and critical thinking required [by the A-G Guidelines]." (Otter Decl. Ex. A, at 7.)

[43]Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' English course was reasonable.

Education and serves on the National Mathematics Advisory Panel. (Stotsky Decl. Ex. 1.)

[43] Professor Otter has taught American literature for sixteen years at the University of California, Berkeley. (Otter Decl. Ex. A, at 3.)

d. *Plaintiffs' Rejected Religion Courses*

The majority of courses that Plaintiffs claim were unconstitutionally rejected were rejected under the UC Policy on Religion and Ethics Courses. (Defs.' Opp'n 12.) This policy requires that approval will be given to religion courses if they "treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint" and should not have as a primary goal promoting the "personal religious growth" of students. (Lynch Decl. No. 1 Ex. 3.) As discussed in Part II.B.1.a.i.(a).(1), Defendants have offered expert testimony from Professor Sharf, which led this Court to determine that the policy was reasonable. Because Plaintiffs only argue that their courses were unreasonably rejected because the UC Policy on Religion and Ethics courses is unconstitutional, the reasonableness of the Defendants' rejections dovetails with the reasonableness of the UC Policy on Religion and Ethics Courses.

Accordingly, there is a genuine issue of material fact as to whether Defendants' rejection of Plaintiffs' religion courses was reasonable.

2. *Free Exercise and Establishment Clauses*

Plaintiffs contend that Defendants exhibit unconstitutional "hostility" toward religion. Plaintiffs' allegations of hostility cover a broad range of hostile acts. (*See, e.g.*, Pls.' MSJ 24 ("UC's policies ... single out (and thus discriminate against)

religious schools that add religious viewpoints...."), 25 ("[A UC reviewer] laughed at a creationist statement.").) Defendants' allegedly hostile acts can be divided into two general categories: (1) UC employees made statements, held beliefs, or took actions that are symbolically hostile to religion or religious schools; and (2) UC employees-in implementing the A-G Guidelines and Policies-took hostile actions that burdened Plaintiffs' religious practice. These categories are analyzed under the Establishment Clause and Free Exercise Clause, respectively.

[44]a. *Symbolic Hostility Under the Establishment Clause*

The *Lemon* test governs "a claim brought under a hostility to religion theory." *Am. Family*, 277 F.3d at 1121; *see also Vernon*, 27 F.3d at 1396 (9th Cir.1994) ("The government neutrality required under the Establishment Clause is ... violated as much by government disapproval of religion as it is by government approval of religion."). Under *Lemon*, government action does not violate the Establishment Clause if it: (1) has a secular purpose, (2) has a primarily secular effect, and (3) does not excessively entangle the government with religion. 403 U.S. at 612-13.

Plaintiffs allege the following actions and beliefs symbolically disapprove of their religion:

(1) "[UC] reviewers spoke sarcastically of 'our favorite, Bob Jones University Press,' and of 'our

favorite books,' and laughed at a creationist statement."

(2) "[UC reviewers] circulated an article about how 'the Red States, on the other hand, now have to cope with ... 100% of all Televangelists, ... *1117 Bob Jones University, ... and [things generally viewed as disfavorable, such as mosquitoes]. A small price to pay for controlling the presidency."

(3) "[AUC] reviewer told the review coordinator that a 'Christian Lifestyles' course was 'weird stuff.' "

(4) "The faculty reviewer of the Christian school science texts believes that theistic evolution is illogical, the later faculty reviewer has 'antipathy' toward creation...."

(5) "The senior reviewer is Buddhist, and the reviewer who handled religious school science courses and drafted most policies is Jewish...."

(6) "The new chair of [the UC review board] testified the 'subtext' of BOARS discussion in adopting the science Position Statement was 'antagonism toward the Christian schools,' and their 'right wing perspectives were highly objectionable.' "

(7) "[UC] reviewers segregated the Christian school courses into a separate list."

(8) "UC ordered copies of a number of BJU Press texts, and created a 'Bibliography of Christian Books Reviewed,' even though UC does not normally review textbooks (just course outlines), to reject them."

[45](9) "[UC] created form 'letters that [UC] sent to Christian schools when [UC] denied some of their courses.' "

(Pls.' MSJ 25-26.)

As a threshold matter, some of Plaintiffs' allegations can be discarded immediately as unworthy of summary judgment. First, allegations (1) and (2) are not "government conduct." There is no indication that it is the official position of UC to laugh at creationist statements or poke fun at "the Red States." These "hostile actions" contrast greatly with those in *American Family*, where the government formally adopted resolutions that criticized religious speech. 277 F.3d at 1119. At best, Plaintiffs have discovered inappropriate and hostile remarks made by UC employees at the expense of religion. However distasteful those statements may have been, they are not fairly characterized as government action even if told in the work environment. [44] *See Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 747 (9th Cir.2003) ("[I]ndividual action may be treated as the government's action if ... that seemingly private behavior may be fairly treated as that of the State itself."); *see also Am. Family*, 277 F.3d at 1125 ("[P]ublic officials may criticize practices that they would have no constitutional ability to regulate, so

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[44] Even if the comments made by UC reviewers were unconstitutional hostility towards religion, the judicial remedy would not be to invalidate the A-G Guidelines and Policies as Plaintiffs request.

long as there is no actual or threatened imposition of government power or sanction.").

Also, allegations (3) and (4) cannot support a claim of hostility. Even if these allegations were true, UC employees may believe whatever they choose to believe. Plaintiffs have not demonstrated that these beliefs affect the way that Defendants review courses, an issue that would require evaluation under the Free Exercise Clause. (*See, e.g.*, Pls.' MSJ 25 ("[T]he coordinator of reviewers believes any course with one religious viewpoint added must be rejected.").)

Additionally, allegation (5) cannot support a hostility claim. UC is under no duty to employ only those individuals whose religious beliefs coincide with Plaintiffs.

[46]*1118 Finally, this Court has previously found that allegation (9) added little to an analysis of motive. (*See* Part II.B.1.a.ii.)

Remaining are allegations (7), (8), and (9), which all relate to Defendants' implementation of the A-G Guidelines and Policies that Plaintiffs claim could be seen as disapproving of religion.[45] Plaintiffs contend

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[45] Allegation (8), as phrased by Plaintiffs, is not supported by any evidence. Although UC ordered Christian textbooks to review, there is no evidence that UC ordered Christian textbooks "to reject them." (Pls.' MSJ 25.) In fact, some Christian textbooks were approved for use as a primary text. (Sawrey Decl. ¶ 3.) In evaluating allegations (7), (8), and (9) under the Establishment Clause, the Court will only consider that UC ordered Christian textbooks for review.

that by keeping a separate list of Christian courses, taking the "unusual" step of reviewing Christian textbooks, and creating form language to reject Christian courses, Defendants could be seen as requiring religious courses to pass greater scrutiny than secular courses.[46]

i. *Secular Purpose*

Defendants provide a simple secular reason for the challenged actions: they were "respon[ding] to certain Christian school representatives' challenges to UC decisions (including threats of and the actual filing of this lawsuit)...." (Hargrove Decl. ¶ 26.) Under the threat of litigation and the subsequent exacting scrutiny that comes with litigation, Defendants took greater care to document their decisions. "Because some Christian schools had complained about rejections of certain of their courses, [UC] decided that questionable courses from those schools would be reviewed by the committee and then in many cases by faculty before they were either approved or disapproved." (Hargrove Decl. ¶ 21.)

ii. *Secular Effect*

Here, an informed and reasonable observer would not find Defendants' action to have "the

[46] Plaintiffs make no attempt to analyze these allegedly hostile actions under *Lemon*, arguing only that the actions are hostile and that hostility is forbidden. (Pls.' MSJ 24-25 ("The Supreme Court has frequently stated that 'hostility toward religion' is forbidden.... [These actions are] unconstitutional hostility toward religion, as a matter of law.").)

principal or primary effect of ... inhibiting religion." *See Am. Family*, 277 F.3d at 1122. Paying [47]more attention to Christian school courses because the Christian schools are vocal about rejections and threatening legal action appears perfectly reasonable.

iii. *Excessive Entanglement*

As discussed in Part II.B.2.a.i.(c), Defendants' actions pose no danger of invasive monitoring. Rather, these actions only serve to help Defendants make a more informed and considered judgment as to whether Plaintiffs' courses meet UC's academic standards.

b. *Burdensome Hostility Under the Free Exercise Clause*

Plaintiffs allege that several of Defendants' actions and beliefs inhibit Plaintiffs' ability to practice their religion:

(1) "UC's policies ... single out ... religious schools that add their religious viewpoint."

(2) "[UC reviewers], in rejecting Christian school science texts and courses, did not question that the courses cover the required science, but objected to the added religious viewpoint."

(3) "[T]he coordinator of reviewers believes any course with one religious viewpoint added must be rejected."

(4) "[T]he faculty reviewer of the history texts believes that courses may *1119 not attribute any event in history to 'a Christian god.' "

(5) "[UC] reviewers all wrote that religion courses taught by Cantwell / Sacred Heart of Mary should be rejected because they taught a single perspective."

(Pls.' MSJ 24-26.)

Again, some of Plaintiffs' allegations can be discarded immediately as unworthy of summary judgment. As described in Part II.A allegations (1) and (2) are simply incorrect.

Allegations (3) and (4) also present a problem. These allegations are each phrased as a "belief" of a single reviewer.[47] Plaintiffs provide no evidence that these beliefs resulted in the rejection of any courses "with one religious viewpoint" or any history courses that "attribute [even a single] event in history to 'a Christian god.' " Further, the evidence presents an issue of material [48]fact as to whether allegations (3) and (4) are true. Plaintiffs' evidence is less than compelling,[48] and UC provides declarations from the

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[47] As discussed in Part II.A, these alleged "beliefs" are not UC policy.

[48] First, Plaintiffs claim that reviewer Jeanne Hargrove believes courses "with one religious viewpoint" should be rejected based solely on two pages of handwritten notes regarding a rejected course. (Pls.' Ex. 302.) Plaintiffs ignore that these notes indicate numerous other problems with the courses.

Second, Plaintiffs claim that Professor James Given believes history courses should be rejected if they "attribute [even a single] event in history to 'a Christian god' " based

reviewers refuting Plaintiffs' allegations. (*See* Hargrove Decl. ¶ 11 ("I do not hold any such belief."); Given Decl. ¶ 5 ("I have not recommended against approval of courses merely because they ... present religious ... explanations of history. Nor does any reference to providential explanations of history automatically disqualify a course for approval in my view.").)

Finally, there is a genuine issue of material fact as to the truth of allegation (2), that "[UC] reviewers all wrote that religion courses taught by Cantwell / Sacred Heart of Mary should be rejected because they taught a single perspective." Plaintiffs cite to documents showing various notes regarding concern about the Cantwell courses, but ignore that these notes express numerous additional concerns. (Pls.' Ex. 282.) These concerns included a lack of prerequisites, a lack of details in key assignments, a need for "broader study of sociological topics," a focus on "religious training," a lack of depth, the use of a questionable text, and "not academically rigorous." (Pls.' Ex. 282.)

Because there is a material issue of genuine fact regarding the existence of Plaintiffs' allegations of hostility, summary judgment is inappropriate on this issue.

3. *Equal Protection Clause*

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solely his comment that "[h]istory is not made by supernatural agents" when rejecting a history course from The Kings Academy. (*See* Pls.' Ex. 130.)

Plaintiffs also challenge Defendants' application of the A-G Guidelines under the Equal Protection Clause. Again, Plaintiffs argue that Defendants' actions treat religious schools and their students differently. As before, if these actions are not unconstitutional under the Free Exercise Clause, Defendants need only supply a rational basis for the actions. As discussed in Part II.C.2, Defendants have raised a genuine issue of material fact as to the rational basis for their actions.

[49]III. *RULING*

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is DENIED and Defendants' Motion for Partial ***1120** Summary Judgment is GRANTED as to Plaintiffs' facial claims.

Remaining as issues for trial are the reasonableness of Defendants' challenged decisions to deny approval for specific religious school courses under the A-G Guidelines and Policies and Plaintiffs' other "as applied" challenges.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (RZx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., V. ROMAN STEARNS, ET AL.,

Aug. 8, 2006

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PUSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)

S. JAMES OTERO, District Judge.

On October 28, 2005, Defendants Regents of the University of California ("UC Regents") and various officials and offices of the University of California ("UC") filed a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On November 21, 2005, Plaintiffs Association of Christian Schools International, Calvary Chapel Christian School ("Calvary Christian School"), and five Calvary Christian School students by and through their parents filed an Opposition to the Motion, to which Defendants replied. On June 27, 2006, this Court heard argument on Defendants' Motion. For the reasons discussed below, the Court GRANTS the Motion in part and DENIES it in part.

[2]I. BACKGROUND

Plaintiffs Association of Christian Schools International, Calvary Christian School, and five Calvary Christian School students by and through their parents have brought suit against Defendants UC Regents and various officials and offices of the UC for violating their constitutional rights. Plaintiffs allege that through the implementation and practice of discriminatory admissions practices, Defendants have discriminated against Plaintiffs, infringing on Plaintiffs' freedom of speech, freedom from viewpoint discrimination, freedom of religion and association, freedom from arbitrary governmental discretion, equal protection of the laws, and freedom from hostility toward religion. *Id.*

According to Plaintiffs' Complaint, there are several methods by which a high school student may be eligible to gain admission to the University of California institutions. (Compl. ¶26.) The most prevalent method for students attending private schools in California is known as "Eligibility in the Statewide Context," by which 92.5% of students achieving eligibility in 2003 did so. *Id.* Under this method, students may be eligible to gain admission to the University of California institutions with a high enough combination of standardized test scores and grades in a required number of courses, known as "a-g" course requirements.[1] *Id.* These a-g course

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[1] General requirements by subject area:
The following sequence of high school courses is required by the University of California of (sic) high school students to be minimally eligible for admission. It also illustrates the minimum level of academic preparation students

[3]requirements are met when students at their respective schools take courses that have been approved by Defendants for a particular subject area. *Id.* ¶ 23.

There are two less favored (i.e., more difficult) methods for achieving eligibility for admission to the

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ought to achieve in high school to undertake university level work.

The a-g requirements can be summarized as follows:

(a) History/Social Science – Two years required, including one year of world history, cultures, and geography and one year of U.S. history or one-half year of U.S. history and one-half year of civics or American government.

(b) English – Four years of college preparatory English that include frequent and regular writing, and reading of classic and modern literature.

(c) Mathematics – Three years of college preparatory mathematics that include the topics covered in elementary and advanced algebra and two-and three-dimensional geometry.

(d) Laboratory Science – Two years of laboratory science providing fundamental knowledge in at least two of these three disciplines: biology, chemistry, and physics.

(e) Language Other Than English – Two years of the same language other than English.

(f) Visual & Performing Arts – One year, including dance, drama/theater, music, [3]or visual art.

(g) College Preparatory Elective – In addition to those courses required in "a-f" above, one year (two semesters) of college preparatory electives are required, chosen from advanced visual and performing arts, history, social science, English, advanced mathematics, laboratory science, and language other than English. (Compl. ¶ 23 (emphasis in original).)

University of California.[2] One such method is known as "Eligibility in the Local Context." Under this method, students ranking in the top 4% at each participating California high school is eligible for admission.[3] *Id.* ¶ 26. Students may also attain eligibility for admission through a method known as "Eligibility by Examination Alone." Only students with exceptionally high scores on standardized tests may qualify for admission by this method. *Id.*

Calvary Christian School avers that it sought to comply with the requirements of offering approved courses satisfying a-g course requirements. Specifically, Calvary Christian School avers that it submitted applications for approval of courses to qualify under the science (d), college preparatory elective (g), history/social science (a), and English (b) categories as described above. *Id.* ¶¶ 31-50. In each instance, Defendants allegedly rejected Calvary Christian School's application for approval. *Id.*

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[2] Another method, not counted as being one to achieve eligibility for admission but outright admission, is known as "Admission by Exception." A student may gain admission to a particular University of California school at the discretion of the campus admissions director. Students admitted through this method are generally those exhibiting exceptional qualifications (e.g., athletes, artists, veterans, etc.) (Compl. ¶ 29.)

[3] A participating high school is a school that offers sufficient approved a-g required courses that would enable its students to achieve Eligibility in the Statewide Context. Hence, at a school that does not offer sufficient approved a-g requirements courses for students to achieve Eligibility in the Statewide Context, these students, accordingly, also would not be able to achieve Eligibility in the Local Context. (Compl. ¶ 26A.)

[4]In rejecting Calvary Christian School's applications, Plaintiffs aver that Defendants made several statements. In response to a biology course application, Defendants Stearns allegedly wrote:

> The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community. As such, students who take theses courses may not be well prepared for success if/when they enter science courses/programs at UC.

Id. ¶ 31. Also. Defendants allegedly have stated generally that biology and physics courses relying on science textbooks containing a Christian viewpoint from two particular publishers would not be approved to meet the lab science requirement. *Id.* Furthermore, rejection of courses relying on the particular textbooks was said by Defendants to be based on "the way in which these texts address the topics of evolution and creationism' and "their general approach to science' in relation to the Bible." *Id.* ¶ 32. It is based on these and other alleged statements made by Defendants that Plaintiffs bring this action for discrimination.

II. LEGAL STANDARD

A. Motion to Dismiss

Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur

Miller, Federal Practice and Procedure §1356 (1990). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also, Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.* 950 F.2d 1478, 1483 (9th Cir. 1991). A [5]court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Studios, Inc., v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all these reasons, "[d]ismissal is warranted only if it appears to a certainty that [plaintiff] would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d at 898. However, a court need not accept as true unreasonable inferences or conclusory legal allegations. *See W. Min. Council v. Watt*, 643 F.2d

618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

B. Subject Matter Jurisdiction

It is a fundamental legal principle that federal courts are courts of limited jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Lack of subject matter jurisdiction may be raised by any party at any time, and it is never waived. "[W]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3); *Hernandez v. McClanahan*, 996 F. Supp. 975, 977 (N.D. Cal. 1998).

III. DISCUSSION

A. Federal Constitutional Claims

1. First Amendment Speech Claim

In their Motion, Defendants contend that Plaintiffs fail to state a First Amendment speech claim "because Defendants are not stopping Plaintiffs from saying whatever they choose and because the University has its own First Amendment right to establish rigorous admission standards." (Defs.' Motion 5.) Furthermore, Defendants argue in their Reply that the cases cited by Plaintiffs are inapposite. (Defs.' Reply 3.) In contrast, Plaintiffs contend that it is not necessary for Defendants to

issue a total prohibition on speech for a freedom of speech violation to occur. (Pls.' Opp'n 6.) Instead, Plaintiffs argue that Defendants' actions, rejecting Plaintiffs' applications for a-g course approval because of Plaintiffs' incorporation of Christian material to the proposed courses, amount to First Amendment violations in the form of content regulation, viewpoint [6]discrimination, prescription of orthodoxy, and chilling of rights. *Id.* Whether or not Plaintiffs have stated a First Amendment freedom of speech claim by so contending is the issue at hand.

a. Restriction of Plaintiffs' Speech

According to the Supreme Court, "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Hence, contrary to Defendants' assertion that Plaintiffs have failed to state a speech violation claim simply because "Defendants are not stopping Plaintiffs from saying whatever they choose" (Pls.' Mot. 5), outright prohibition of particular activities is not required for a First Amendment speech violation. Instead, the Supreme Court has found in a number of cases (*i.e.*, many of those cases cited by Plaintiffs) that the freedom of speech is violated where government actions had the same effect if impeding the freedom of speech even without explicitly curtailing what was said.[4]

[4] The Defendants' efforts to convince this Court that prior Supreme Court First Amendment decisions are inapposite to the matter at hand are unavailing. In *Healy*, where a school administration denied official recognition to a student group,

Fundamentally, the government is forbidden from engaging in regulation of speech based on its substantive content or its message. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972). The bar against content—based regulation is high: "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[7]The practice of viewpoint discrimination is related to that of content-based regulation. "Viewpoint discrimination is...an egregious form of content discrimination." *Id.* Viewpoint discrimination occurs when the government takes issue with particular views held by a speaker on a subject, rather than with the subject matter itself. *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

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the Supreme Court purposely chose to disagree with the lower courts' characterization of the consequences of nonrecognition. Justice Powell stated, "[I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's actions. We are not free to disregard the practical realities." He then went on to quote Justice Stewart: "'Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183 (citations omitted). Accordingly, this Court is not free to disregard the practical realities of Defendants' actions with respect to Plaintiffs' First Amendment rights. As in *Healy* and in the other cases cited by Plaintiffs, Plaintiffs aver that the practical reality of Defendants' actions is that it has become more difficult for Plaintiffs to exercise their First Amendment rights. If Plaintiffs' averment proves to be true, whether or not such effect is justified within the bounds of the law is the primary inquiry of this action.

Government regulation of a speaker's viewpoint simply is not allowed. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Here, Plaintiffs have alleged in their Complaint that it is the inclusion of religious material, and more specifically, that of a Christian viewpoint, to standard subject matter presentation in the course applications that prompted Defendants' rejection of Plaintiffs' applications for a-g course approval. The Complaint clearly states that "Defendants have rejected textbooks and courses based on a viewpoint of religious faith." (Compl. ¶ 30.) Further, the Complaint states that Defendants explicitly acknowledged that rejection of proposed science courses was based on the use of textbooks containing a Christian viewpoint. In fact, Plaintiffs have alleged that Defendants have a policy of rejecting applications from Christian schools that use particular textbooks containing a Christian viewpoint. Such applications generate a standardized response: "The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community." *Id.* ¶ 31. The Complaint makes clear that no other reasons have been given for rejecting the applications. *Id.* ¶ 33. In addition, the Complaint contains information on Defendants' *"University of California Position Statement: 'A G' Course Approval for High School Science Courses Taught from Textbooks from Selected Christian Publisher."* *Id.* ¶ 32. The Position Statement, directed at Christian schools and discussing the requirements for approved science courses, instructs Christian schools to "develop and

submit for UC approval a *secular* science curriculum with a text and course outline that addresses course content/knowledge *generally accepted* in the scientific community." *Id.* (emphasis in original).

Evidently, Plaintiffs' references to Defendants' alleged acts of content-based regulation and viewpoint discrimination in their Complaint are numerous and specific. The Complaint contains detailed accounts of the responses Plaintiffs received from Defendants after submitting [8]applications for approval in various subject areas (*e.g.*, history ¶¶ 39-44; English and literature ¶¶ 45-47; social science ¶¶ 48-50). The Complaint also contains specific allegations as to the roles of the individual Defendants in commission of the alleged First Amendment violations, ¶¶ 54-55. Suffice it to say, the Complaint clearly indicates that Plaintiffs have alleged sufficient facts to allow this claim to go forward.

b. Defendants' First Amendment Rights

Defendants assert that Plaintiffs' claim of free speech violation under its content-based/viewpoint discrimination theories fails because "the University's right to set its own admissions standards is protected by the First Amendment." (Defs.' Mot. 7.) Defendants argue that the evaluation and approval or disapproval of the content and viewpoints of academic expression is required to enforce academic standards. *Id.* at 8.

Certainly, members of the Supreme Court have articulated on various occasions that a university's

decisions regarding its admissions policies deserve a measure of sanctity. Justice Powell, in another matter involving the University of California Regents, stated, "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., Concurring). Justice Frankfurter described admissions policies as being among the "four essential freedoms" of a university, along with the freedoms of "who may teach, what may be taught, [and] how it shall be taught." *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

However, as Plaintiffs point out, the freedom that a university enjoys to determine its own admissions policies is not without limit. Justice Powell in *Bakke* recognized, "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." 438 U.S. at 314. Essentially, *Bakke* supports the proposition that a university's freedom to determine who is to be admitted does not extend so far as to allow invidious discrimination in admissions policies. Along with race discrimination, the issue in *Bakke*, bias against a person because of her religion has been characterized by the Supreme Court as an invidious discrimination. *Cameron v. Johnson*, **[9]**381 U.S. 741, 751 (1965). By extension, it is difficult to imagine how discrimination because of a particular manifested religious viewpoint could itself be anything less than invidious.

In the matter at hand, at issue is Defendants' rejection of Plaintiffs' applications for a-g course approval. If in fact such rejection is based on Defendants' discrimination of Plaintiffs' applications solely because of the religious viewpoints expressed in the applications, such action would run afoul of the limits of Defendants' freedom to determine its admissions policies. Hence, Defendants' assertion of their First Amendment right to set their own admissions standards does not shield Defendants from the prohibition of engaging in content-based regulation or viewpoint discrimination.

In addition, Defendants contend that the regulation of content and viewpoints of academic speech is permissible as long as it is "reasonably related to legitimate pedagogical concerns." (Defs.' Mot. 10.) This standard, articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), concerned a public high school principal's decision to censor certain articles written by students in a journalism class for a newspaper created by that class. Defendants cite a number of appellate level decisions to support their position that their rejection of Plaintiffs' applications for a-g course approval, even if based on the content and viewpoints contained within the course applications, does not violate the First Amendment. These cases, however, along with *Hazelwood*, are inapposite to the issue at hand. In *Hazelwood*, *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the speech at issue was that of students attending the schools that were regulating the speech. Here, the

speech at issue is that of independent entities (*i.e.*, Christian schools) and is not necessarily student speech. Granted, students are included among the Plaintiffs, but the applications put forth for a-g course approval were ostensibly prepared and submitted by the school and thus arguably may be considered to primarily be the school's speech. Hence, the issue has less to do with a school censoring its own students' speech, and more to do with a school (*i.e.*, Defendants) censoring a separate entity's (*i.e.*, Plaintiffs) speech. This crucial distinction in the relationship of the parties makes it difficult to rationalize why the standard in *Hazelwood* should apply here.

[10]Neither is *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), another case cited by Defendants, particularly instructive. The court in *Fleming* was concerned with speech "that might reasonably be perceived to bear the imprimatur of the school and that involved pedagogical concerns." 298 F.3d at 924. The facts in *Fleming* may be better analogized to those in the matter at hand, as the speech there was that of community members and not limited to students, as in the instant matter. However, here, unlike for the speech at issue in *Fleming*, it simply would not be reasonable for all courses that receive a-g course approval to be perceived as bearing Defendants' imprimatur. A-g approved courses are clearly taught by many different high schools across the state of California, entities separate and independent from Defendants. In addition, the number and range of course topics make it unlikely for the courses to be perceived as being anything but courses taught by

the respective high schools. Hence, even if Defendants' actions in rejecting Plaintiffs' course applications are reasonably related to legitimate pedagogical concerns, this outcome does not necessarily shield Defendants from First Amendment liability, in the event of content-based or viewpoint discrimination of Plaintiffs' speech.

A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Based on the information contained in the Complaint, it is evident that Plaintiffs have alleged sufficient facts to state a claim for violation of the freedom of speech in the forms of content-based regulation and viewpoint discrimination. Defendants' arguments of their own First Amendment rights permitting potential infringement upon the rights of Plaintiffs are unavailing. As such, it is not necessary for the Court to explore at this time the Plaintiffs' other freedom of speech violation charges of prescription of orthodoxy and chilling of speech. Defendants' Motion to Dismiss Plaintiffs' freedom of speech claim is DENIED.

2. Free Exercise of Religion Claim

Defendants also take issue with Plaintiffs' claim that Defendants' actions violate Plaintiffs' free exercise of religion. In *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 .S. 707 (1981), the Supreme Court established:

> [11]Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 717-18. The court also observed that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task...However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question...." *Id.* at 714. As the court put it, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

The Supreme Court's decision in *Thomas* is instructive. In that case, the court held that a state's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion. Thomas, the petitioner, held religious beliefs that forbade him from participating in the production of armaments. He was forced to leave his job when his employer transferred him to a division that fabricated turrets for tanks. Indiana subsequently denied him unemployment compensation benefits. The Supreme Court recognized that the coercive impact was indistinguishable from that in *Sherbert v. Verner*,

374 U.S. 398 (1963), in which the court held that a ruling disqualifying petitioner from benefits because of her refusal to work on Saturday in violation of her faith "force[d] [the petitioner] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Citing *Sherbert* the *Thomas* court stated "[n]ot only is it apparent that appellants' declared ineligibility for benefits derives solely from the practice of [his] religion, but the pressure upon [him] to forego, (sic) that practice is unmistakable." *Thomas*, 450 U.S. at 717. The court therefore determined that Thomas had been "put to a choice between fidelity to religious belief or cessation of work." *Id* at 717. Accordingly, the court held that Indiana's denial of unemployment compensation benefits violated Thomas' right to the free exercise of his religion.

[12]At the June 27, 2006 hearing on this Motion, Plaintiffs' counsel stated that Plaintiffs have not pled a substantial burden on a central religious belief or core practice. Defendants' counsel, however, conceded that centrality may not be crucial to Plaintiffs' free exercise claim. In the instant case, Plaintiffs generally aver:

> The a-g course requirements effectively provide (or are interpreted to provide) that specifically Christian content and viewpoints are disapproved and, if in the disapproved category, may not be added to standard course material, even though all the standard course material is taught, if the course and text is to meet a-g

> course requirements. This violates the freedom of religion of plaintiffs, and bars admission to the University of California on account of religion. It also abridges the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs, and for parents to train their children in their religious faith.

(Compl. ¶77.) A complaint shall not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Viewing Plaintiffs' allegations in the light most favorable to Plaintiffs, as the Court must, the Court determines that Plaintiffs have stated a valid free exercise of religion claim. Plaintiffs have adequately shown that they have been put to the choice between providing and taking courses that promote a biblical moral view or complying with the UC's a-g course requirements. Because Plaintiffs have alleged that the a-g course requirements place a burden on their religion, Defendants' Motion to Dismiss Plaintiffs' free exercise claim is DENIED.

3. Freedom of Association Claim

Defendants also dispute Plaintiffs' freedom of association claim. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Supreme Court clearly identified the two lines of decisions protecting the freedom of association. First, the freedom of private association protects "choices to enter into and maintain certain intimate human relationships...against undue

intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. Second, the freedom of expressive association is protected "for the purpose of engaging in those activities protected by the first Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id* at 618. Government interference with one type of associational freedom will often [13]burden the other type as well. *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

Here, Plaintiffs claim that the a-g course requirements effectively prevent the addition of Christian content and viewpoints to standard course material if the course is to meet a-g course requirements. (Compl. ¶77.) Plaintiffs further argue that the a-g course requirements "abridge[] the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs." (Compl. ¶ 77.) Plaintiffs' Opposition to the instant Motion echoes an allegation put forth in the Complaint's section on the First Cause of Action, paragraph 61:

> The Plaintiff students would otherwise qualify for admission to UC-their standardized scores are in the top 15%-except for the school they chose and the *shared viewpoints* there-which means that they are ineligible for admission to UC unless they are in the top 2-4% under the alternatives, if they choose disqualified courses with a Christian perspective or if Defendants

> implement their new approach to disqualify most of the other courses.

(Pls.' Opp'n 11 (emphasis added).) Insofar as Plaintiffs' claim is based on their right to congregate to share and discuss their viewpoints, in this case Christian viewpoints, and the effect of the a-g course requirements preventing them from doing so, Plaintiffs have stated a claim for a violation of their freedom of association. Hence, Defendants' motion to Dismiss Plaintiffs' freedom of association claim is DENIED.

4. Fourteenth Amendment Procedural Due Process Claim

Defendants also request that this Court dismiss Plaintiffs' federal procedural due process claim. Defendants are constrained from making decisions depriving Plaintiffs of "liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Some interests are "protected...because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976). Property interests, on the other hand, "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[14]Defendants challenge Plaintiffs' federal procedural due process claim with two arguments. First, Defendants contend that Plaintiffs have failed to allege deprivation of a previously possessed property or liberty. (Defs.' Mot. 15.) Second, Defendants also assert that Plaintiffs "have no legal entitlement...to have any particular classes designated as meeting the a-g requirements, and they do not have any legal entitlement to attend the University other than in compliance with its admissions criteria." *Id.*

Plaintiffs counter by identifying a host of First Amendment rights that are discussed in the Complaint, along with the right to be nondisciminatorily considered for university admission as a property interest. (Pls.' Opp'n 12.) The Supreme Court has found that the application of the due process provision of the Fourteenth Amendment extends at least to the rights of speech, press, and religion under the First Amendment. *Duncan v. State of La.*, 391 U.S. 145, 147-48 (1968). Plainly, Plaintiffs have identified their deprived liberty interests as those encompassed within the First Amendment, including free speech (Compl. ¶ 81) and academic freedom, *id* ¶84, thereby defeating Defendants' first challenge to Plaintiffs' procedural due process claim.

The analysis for Defendants' second challenge is more involved. Although Plaintiffs assert that they have a property interest in the "right to be nondiscriminatorily considered, once California established universities" (Pls.' Opp'n 12), Plaintiffs' citation to *Goss v. Lopez*, 419 U.S. 565, to support

such an assertion is unconvincing. In *Goss*, the persons claiming a property interest in a public education did so on the basis of state laws that required both the provision and the receipt of the benefit. *Id.* at 573. Here, it is unclear what exactly is the basis for Plaintiffs' purported property interest in the "right to be nondiscriminatorily considered." Hence, Plaintiffs have failed to identify a property interest for their federal due process claim. However, because Plaintiffs have identified several First Amendment liberty interests, Defendants' Motion to Dismiss this procedural due process claim is DENIED.

5. Unconstitutional Condition

Defendants contend and Plaintiffs agree that the University's admissions criteria are not an unconstitutional condition. (Defs.' Mot. 15; Pls.' Opp'n 12.) However, Plaintiffs assert that [15] "recent changes to require not just subject areas, but approved and nondisqualified viewpoints and content regulation, do create an unconstitutional condition." (Pls.' Opp'n 12-13.)

According to the Supreme Court, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech even if he has not entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006) (citations omitted). The unconstitutional conditions doctrine extends to other "constitutionally protected interests" in addition to the freedom of

speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

As Defendants have noted, the court's determination of the existence of an unconstitutional condition takes place in sequence. "As a prerequisite to discerning a constitutional violation for an unconstitutional condition...we must first examine the validity of the underlying alleged constitutional rights." *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (citations omitted). *See also, Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (declining to address respondent's unconstitutional conditions argument by first finding no constitutional violation). Accordingly, Defendants' defense of its standards as not being an unconstitutional condition is premature; although this Court has found that Plaintiffs have alleged sufficient facts for Plaintiffs' constitutional rights claims against Defendants to go forward, this Court has yet to "examine the validity of the underlying alleged constitutional rights." *Vance* 345 F.3d at 1088. Hence, the Court declines to consider either Defendants' argument of there being no unconstitutional condition or Plaintiffs' argument of the existence thereof.

B. Defendants Subject to Suit

In order for this action to move forward, the Defendants must be subject to suit. Defendants contend that as an arm of the state of California, the UC Regents (along with its operating units Board of Admissions and Relations with Schools (BOARS) and Office of the President (UCOP)) is not subject to suit

under 41 U.S.C. § 1983, under which Plaintiffs bring this action.

A state and its officers sued in their official capacity are not subject to suit under 42 U.S.C. § 1983, as they are not considered "persons" within the meaning of the statute. *Cortez v.* [16]*County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002). "States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes" are excluded from the definition of "persons" in § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Because the UC Regents is considered an arm of the state under the Eleventh Amendment, it therefore is not considered a "person" subject to suit under 42 U.S.C. § 1983. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Clearly, Plaintiffs may not sue the UC Regents under 42 U.S.C. § 1983 as they might any other "person."

Plaintiffs make three arguments to try to convince this Court that the UC Regents is nonetheless subject to suit. Plaintiffs' first argument, that the UC Regents is subject to suit as a state officer under *Ex parte Young*, 209 U.S. 123, 160 (1908), is unconvincing. *Ex parte Young* stands for the proposition that "a suit challenging the constitutionality of a state official's action is not one against the estate." *Pennhurst State Sch. & Hosp. v. Halderman*, 405 U.S. 89, 102 (1984). Although this exception to the doctrine of sovereign immunity allows state officers to be sued, Plaintiffs' citation to *Regents v. Super. Ct. of Los Angeles County*, 3 Cal. 3d 529, 536 39, 131 Cal. Rptr. 228, 230 (1976), is hardly sufficient to overcome the plethora of cases explicitly

excluding the UC Regents from suit under 42 U.S.C. § 1983. As Defendants point out in their Reply, *Regents v. Super. Ct. of Los Angeles County* held only that the UC Regents is an "officer" for specific California venue laws. Plaintiffs' expansive reading here of the California Supreme Court's holding is unmerited. In the absence of convincing authority that the UC Regents is indeed and "officer" for purposes of *Ex parte Young*, Plaintiffs' first argument fails.

Plaintiffs next argue that the UC Regents enjoys Eleventh Amendment immunity only in limited functions and not in this situation. Certainly, the UC Regents' immunity from suit is not all-encompassing of the University's many functions. In *Doe v. Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (9th Cir. 1995), *rev'd on other grounds sub nom. Regents of the Univ. of Cal. V. Doe*, 519 U.S. 425 (1997), the Ninth Circuit employed a five-factor analysis to determine if the University, "acting in a managerial capacity for the Laboratory, is an arm of the state and thus is entitled to Eleventh Amendment immunity from suit in federal court." *Lawrence Livermore Nat'l Lab*, 65 F.3d at 774. The California Supreme Court has also limited the UC Regents' sovereign immunity. *See,* [17]*e.g. Regents v. Super. Ct.*, 17 Cal. 3d 533, 537 (1976) (declining to extend sovereign immunity to the University's lending decisions in investment of portfolio). Plaintiffs also point to an number of suits brought against other states' equivalents of the Regents that were allowed by the U.S. Supreme Court without discussion of sovereign immunity. (Pls.' Opp'n 15.) In addition, Plaintiffs cite to a matter in the

Northern District of California that allowed an injunctive relief suit against the UC Regents to go forward, *McVey v. Bd. of Regents of the Univ. of Cal.*, 165 F. Supp. 2d 1052, 1057 (N.D. Cal. 2001). Despite Plaintiffs' apparent urging of this Court to simply rely on past instances in which the UC Regents (or other states' equivalents) has been subject to suit, without clear authority supplying this Court with a rationale for doing so, this argument necessarily fails.

Finally, Plaintiffs argue that "applying the Ninth Circuit's five-factor test to the function of Regents that regulates course content or approved viewpoints of nonpublic schools" will convince this Court that the UC Regents is subject to suit. (Pls.' Opp'n 16.) The five factors in the Ninth Circuit's test are:

> (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has power to take property in its own name or only the name of the state, ad (5) the corporate status of the entity.

ITSI TV Prods. v. Agric. Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993). Without question the single most important factor in the analysis is whether the state would be liable for a money judgment against the defendant. *Lawrence Livermore Nat'l Lab.*, 65 F.3d at 774; *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (1982). Here, Plaintiffs do not seek money damages; they seek only injunctive and declaratory relief. (Pls.' Opp'n 19.) In such a case it would appear that

the first and more weighty factor on its face weighed in favor of finding the UC Regents as not being an arm of the state. However, past authority would support the opposite result.

First, the Supreme Court, in its reversal of the Ninth Circuit decision in *Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (finding the University in its function there to not be an arm of the state), took issue with the Ninth Circuit's characterization of the government's indemnification of the University as weighing the first factor against granting the University Eleventh Amendment [18]immunity from suit in federal court. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997). The Court there stated "that with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability...that is relevant." *Id.* It is true that here there is no potential legal liability, as Plaintiffs do not seek money damages. However, the fact that Plaintiffs are not pursuing money damages does not alter the relationship between the state of California and the University. If Plaintiffs were seeking money damages, it would be the state of California to which they would look. Hence, the first factor should weigh in favor of granting the UC Regents immunity from suit.

Second, the Ninth Circuit has addressed the situation where the appellant sought both damages and injunctive relief against an appellee that claimed Eleventh Amendment immunity. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1988). There, after only limited discussion of the first factor in its five-factor analysis, the Ninth

Circuit found that the appellee, a school district, was entitled to Eleventh Amendment immunity from the appellant's 42 U.S.C. § 1983 claim in damages *and* for injunctive relief. *Id.* at 201. There was no separate analysis of the claim due to the fact that injunctive relief was sought; that the first factor in the analysis did not apply to the plaintiff's request for injunctive relief did not matter in the court's decision to grant Eleventh Amendment immunity from the § 1983 claim for both types of relief. Here, although money damages are not being sought, it is not apparent that such absence makes any difference to the five-factor analysis as would be conducted if Plaintiffs did request damages. Hence, again, the first factor would weigh in favor of granting the UC Regents immunity from suit.

Third, the Supreme Court has stated that sovereign immunity is not limited to suits seeking money damages. "'This jurisdictional bar [under the Eleventh Amendment] applies regardless of the nature of the relief sought.'" *Pennhurst*, 465 U.S. 89, 100. Further, the Court has equated the effect of money damages with that of injunctive relief, at least in noting what it is that qualifies a suit as being against a sovereign. "'The general rule is that suit is against the sovereign if 'the judgment sought would expend itself on the public treasure or domain...,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Id.* at 102 n.11 (citations omitted). Here, in this Eleventh Amendment analysis, given the Supreme Court's **[19]**characterization of suits against a sovereign, it is not evident that Plaintiffs' choice not to seek money damages makes this suit

any less against a sovereign entity and, thereby, entitled to sovereign immunity. Hence, the first factor does not weigh against granting the UC Regents immunity from suit.

The analysis for the other factors is similar to the analysis performed by the Ninth Circuit in *Lawrence Livermore Nat'l Lab.* and is not repeated here. Because the first and most important factor weighs in favor of finding UC Regents immune from suit in federal court, which is not overcome by the other factors in the analysis, the Ninth Circuit five-factor test supports the proposition that the UC Regents should be found to be an arm of the state. Therefore, the UC Regents is entitled to Eleventh Amendment immunity from suit in federal court, and the claims against the UC Regents (including its operating units BOARS and UCOP)[5] are DISMISSED.

C. Federal Jurisdiction for State Law Claims

Plaintiffs and Defendants agree that claims based on violations of state law, made against state officers in their official capacity cannot be decided. (Defs.' Mot. 18; Pls.' Opp'n 17.) However, the officers here are also sued in their individual, or personal, capacity. Defendants do not disagree that federal courts may decide state law claims against state officers in their personal capacity, but only if the suit is for damages. (Defs.' Reply 5.) Plaintiffs, however, assert that the jurisdiction of federal courts are not

[5] Plaintiffs admit that they "have not found clear authority that [BOARS and UCOP] are entities. (Pls.' Opp'n 17.)

limited to suits for damages, but generally covers claims against state officers acting in their personal capacity. (Pls.' Opp'n 18.)

The Eleventh Amendment bars suits against a state in federal court without the state's explicit consent. *In re State of N.Y.*, 256 U.S. 490, 497 (1921). This jurisdictional bar applies not only when the state is the named party, but also when it is the party in fact. *Edelman v. Jordan*, 415 U.S. 651 (1974). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Haw. V. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). An exception to the Eleventh Amendment bar exists to allow suits**[20]**challenging the constitutionality of a state official's action. *Ex parte Young*, 209 U.S. 123. However, this exception exists only for federal claims seeking prospective injunctive relief. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) (citation omitted). Further, *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106.

Defendants contend that Ninth Circuit authority "prohibits federal courts from deciding state law claims for injunctive or declaratory relief against state officials." (Defs' Mot. 18.) Such prohibition, Defendants claim, extends to "personal-capacity claims for injunctive or declaratory relief under state law." (Defs.' Reply 5.) In support of their argument, Defendants cite three cases. Indeed, the courts in *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), *Hand v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), and

Leventhal v. Vista Unified Sch. Dist., 973 F. Suppl 951 (S.D. Cal. 1997), cite *Pennhurst* as standing for the proposition that federal courts are barred by the Eleventh Amendment from deciding state law claims for injunctive or declaratory relief against state officials.[6] Yet there is no discussion in these cases of the difference, if any, in the treatment of suits against state officials in their official or personal capacity.

Another Ninth Circuit case, *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997), sheds more light on the Supreme Court's rationale for finding some cases to be barred by the Eleventh

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[6] In *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), the plaintiffs sought declaratory relief and an injunction to enjoin the enforcement of a regulation promulgated by the California Public Utilities Commission. The Ninth Circuit cited *Pennhurst* as standing for the proposition that the Eleventh Amendment "bars claims in federal court against state officials based on state law violations." 833 F.2d at 204 (citation omitted). The court subsequently declared the plaintiffs' claim barred by the Eleventh Amendment.

In *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), the plaintiffs sought what the court held to be a retrospective remedy and the Ninth Circuit against cited *Pennhurst* in declaring itself "barred by the Eleventh Amendment from deciding claims against state officials based solely on state law." 45F.3d at 339 (citation omitted).

In *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), the plaintiffs brought suit against school board members in their official capacity, seeking injunctive and declaratory relief. The district court there cited *Pennhurst* for he proposition that the "Eleventh Amendment bars federal courts from granting injunctive relief against state officials for violations of state law." 973 F.Supp. at 956.

Amendment while others are not. In *Asker,* the Ninth Circuit described *Pennhurst* as [21]standing for the proposition that the "Eleventh Amendment barred a federal district court from hearing a supplemental state law claim for an injunction against a state officer acting in his *official* capacity." *Ashker*, 112 F.3d at 394 (emphasis in original). The court went on to discuss the question of suit against an officer in his or her personal capacity on a state law claim for money damages, the issue of a similar suit, but such a claim for injunctive relief was not discussed. However, the Ninth Circuit did take the opportunity to note that in *Pennhurst*, 465 U.S. 89, "[t]he Supreme Court observed that 'a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when – as here-the relief sought and ordered has an impact directly on the State itself.'" *Ashker*, 11 F.3d at 394. This statement suggests that, in determining whether claims are barred by the Eleventh Amendment, the Supreme Court primarily considers whether such relief would directly impact the state itself. Hence, a state claim for injunctive relief against a state official, in either his or her official or individual capacity, would be barred in federal court, as such relief would necessarily "have an impact directly on the State itself."

In contrast, Plaintiffs cite Ninth Circuit authority to contend that *Pennhurst* is inapposite to the matter at hand. First, Plaintiffs cite *Demery v. Kupperman*, 735 F.2d 1139, 1150-51 (9th Cir. 1984), to stand for the proposition that "*Pennhurst* addressed only official capacity claims, and not personal capacity claims under state law." (Pls.'

Opp'n 17.) Indeed, the Ninth Circuit in *Demery* addressed the situation where a §1983 suit seeking money damages was brought against the defendants in their individual capacity. There, the Ninth Circuit declined to find that the Supreme Court's ruling in *Pennhurst* prevented the bringing of suit in federal court against state officials in their individual capacity to damages.[7] *Demery*, 735 F.2d at 1151.

Next, Plaintiffs assert that the Ninth Circuit addressed the issue of personal capacity claims under state law in *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992), holding that "*Pennhurst* did not address, and does not apply to, personal capacity claims under state law." (Pls.' Opp'n **[22]**17.) In *Pena*, the Ninth Circuit found that the Eleventh Amendment did not bar the plaintiff's pendent state claims against state officials acting in their individual capacity. *Pena*, 976 F.2d at 474. Notably, the plaintiff in *Pena* did not seek prospective injunctive relief, as Plaintiffs do here.[8]

Despite Plaintiffs' attempts to distance *Pennhurst* from the instant matter, the Court is unconvinced that the Eleventh Amendment does not bar from federal court suits containing state claims for injunctive or declaratory relief against state officials in his or her persona capacity. Clearly, in

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[7] The Supreme court indirectly agreed with the Ninth Circuit's reading of *Pennhurst in Hafer v. Melo*, 502 U.S. 21 (1991) (allowing suit for monetary damages and reinstatement against state official in her individual capacity).

[8] "Pena did not request injunctive relief in his original complaint." *Pena*, 976 F.2d at 473 n.5.

Pena, the Ninth Circuit "held that the Eleventh Amendment would not bar federal or pendent state claims seeking *damages* against a state official acting personally." *Ashker*, 112 F.3d at 394-95 (citation omitted) (emphasis added). However, the Ninth Circuit in *Pena* appears to have decided on a narrower question than Plaintiffs contend that they did. In other words, the Ninth Circuit did not conclusively decide in *Pena* if the Eleventh Amendment bars state claims seeking injunctive or declaratory relief against a state official acting personally.

"A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). As such, given that Plaintiffs have failed to convince this Court that *Pennhurst* is not instructive for the issue at hand, and given the Supreme Court's observation that the Eleventh Amendment bars in federal court state law claims against state officials that seek relief that has an impact directly on the state itself, this Court decline to find that jurisdiction exists over Plaintiffs' state law claims. Hence, Defendants' Motion to Dismiss Plaintiffs' state law claims is GRANTED.

D. "Individual Capacity" Claims

Defendants request that claims against Defendants in their "individual capacity" be dismissed. Defendants assert that suits against officials in their individual capacity are "appropriate only where plaintiffs seek damages to be paid out of

the official's personal assets or action by the individual personally, rather then [sic] as a government official." (Defs.' Mot. 19) [23]Plaintiffs counter that personal capacity suits for injunctive or declaratory relief, as here, are proper and are allowed. (Pls.' Opp'n 18.)

At the least, Defendants' reliance on the Supreme Court's discussion in *Ky. v. Graham*, 473 U.S. 159, 165-66 (1985), of the difference between personal capacity and official capacity suits, to mandate their position is misplaced. As Plaintiffs have stated in their Opposition (Pls.' Opp'n 18), the Supreme Court's discussion in *Graham*, merely gave "concrete examples of the practical and doctrinal differences between personal and official capacity actions" because "this distinction [between the two types of actions] continues to confuse lawyers and confound lower courts." 473 U.S. at 165. There is no indication in *Graham* that the Supreme Court meant to limit or delineate the capacity in which future plaintiffs should bring particular kinds of suit against state official defendants. *See Hafer v. Melo* 502 U.S. 21, 25 (1991). Defendants' citation to *Am. Civil Liberties Union of Miss., Inc. v. Finch* 638 F.2d 1336, 1338 (5th Cir. 1981) is similarly flawed.

In support of Plaintiffs' argument that personal capacity suits may be for injunctive or declaratory relief, Plaintiffs assert that *Ex parte Young* suits and § 1983 suits are personal capacity suits. (Pls.' Opp'n 19.) Defendants contend that *Ex parte Young* suits are, rather official-capacity suits. (Defs.' Reply 5.) Indeed, the legal fiction that the Supreme Court created in *Ex parte Young* to bypass the Eleventh

Amendment allowed for suit to be brought against the unconstitutional conduct of an official. The fiction postulates that "[the officer] is in that case stripped of his official or representative character and is subjected in his person to the consequences of his *individual* conduct." *Ex parte Young*, 209 U.S. at 160 (emphasis added). Such description of how it is that suit is allowed to be brought against what ostensibly are the actions of an official simply carrying out his or her duties, appears to indicate that the official there is subjected to suit in his or her individual capacity. However, additional Ninth Circuit and Supreme Court case law would indicate that Defendants' interpretation of *Ex parte Young* ultimately prevails.

Indeed, the Ninth Circuit has characterized *Ex parte Young* suits as where "a state official in his or her *official* capacity, when sued for injunctive relief, [is] a person under § 1983, because 'official-capacity actions for prospective relief are not treated as actions against he State.'" *Wolfe* [24]*v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) (internal citation sand quotation marks omitted) (emphasis added). In making this observation, the Ninth Circuit drew upon Supreme Court case law. *Id.* Clearly, the legal fiction that the Supreme Court created in *Ex parte Young* is, at best, only a fiction, and suit brought under *Ex parte Young*, although perhaps *treated* as a personal capacity suit,[9] is *actually* brought against officials in their official capacity.

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[9] "An *Ex parte Young* suit is treated as a personal capacity suit: 'Under the doctrine of *Ex parte Young*, courts treat a suit against a state officer to enjoin a violation of federal law as an

Plaintiffs also argue that "a Section 1983 suit...is normally a personal capacity suit" and cites to *Hafer*, 502 U.S. 21, in support of this contention. (Pls.' Opp'n 19.) The Court agrees that a § 1983 suit may be brought against an official in his or her personal capacity. However, no authority has been presented that would indicate that a § 1983 suit is "normally a personal capacity suit." Without conclusive authority indicating that Plaintiffs may sue Defendants in their "individual capacity" for injunctive and declaratory relief this Court declines to allow these claims to go forward. Hence, Defendants' Motion to Dismiss claims against certain Defendants in their "individual capacity" is GRANTED.

E. Claims Against Dennis J. Galligani

Apparently, Dennis J. Galligani has retired from the position of Associate Vice President for Student Academic Services. (Defs.' Mot. 20.) Defendants request that this Court dismiss Mr. Galligani as a defendant *Id.* Plaintiffs argue that "Mr. Galligani's successor should be substituted hen he or she takes office." (Pls.' Opp'n 20.) Federal Rule of Civil Procedure 25(d)(1) specifies that substitution is the proper course to take. Defendants fail to advance any reason why this Court should deviate from such course. Hence, Defendants' Motion to Dismiss Mr. Galligani as a defendant is DENIED. Of course, in light of the Court's granting of Defendants' Motion to

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individual-capacity suit...' *Moore's Federal Practice* § 123.40[3][b] (2005)." (Pls.' Opp'n 19.)

Dismiss claims against certain Defendants in the "individual capacity," claims against Mr. Galligani are limited to federal claims against him in his official capacity.

[25]IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' First, Second, Third and Fourth Causes of Action. In additional, the Court GRANTS Defendants' Motion to Dismiss all claims against the UC Regents, the components of Plaintiffs' First, Second, Third, Fourth, Fifth and Sixth Causes of Action that are based on California law, and all claims against any of the Defendants in their individual capacity. Moreover, this Court DENIES Defendants' Motion to Dismiss claims against Dennis J. Galligani in his official capacity.

To the extent that the Court GRANTS Defendants' Motion, Plaintiffs' claims are dismissed with prejudice. The filing of an Amended Complaint is not required. Defendants have twenty (20) days to answer the reminder of the Complaint.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 08-56320

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

March 1, 2010.

Before: HALL, THOMPSON and SILVERMAN, Circuit Judges.

Judge Silverman has voted to deny the appellants' petition for rehearing by the court en banc, and Judges Hall and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing by the court en banc is DENIED.

APPENDIX F

UNIVERSITY OF CALIFORNIA BOARD OF ADMISSIONS AND RELATIONS WITH SCHOOLS SUBCOMMITTEE ON HIGH SCHOOL ARTICULATION

Statement on Religion and Ethics Courses

In order, to be considered as history, social science, and English courses, courses in religion or ethics taught in schools should have the following characteristics in order to satisfy the 'f' requirement:

1. The course should treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint.

2. The course should not include among its primary goals the personal religious growth of the student.

BOARS wishes to reiterate its recognition that there are many courses which are valuable for the student and appropriate for the setting in which they are given but which do not meet the 'f' requirement for admission to the University. Failure to meet the 'f' requirement does not detract from the value of such courses but simply means that BOARS would not want to see the student take them to the exclusion of other courses described in the 'f' requirement

APPENDIX G

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FOURTEENTH AMENDMENT

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.